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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
BILL NELSON, and JIM SMITH

Against John H. Phipps, Inc.,
Licensee of Station WCTV(TV),
Thomasville, Georgia

ORDER

Adopted: December 13, 1994; Released: December 27, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it: (a) a Complaint, filed May 29, 1992, by Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (collectively "Complainants") against John H. Phipps, Inc. ("Phipps"), licensee of Station WCTV(TV), Thomasville, Georgia; and (b) a Response to Complaint, filed July 1, 1992, by Phipps. Complainants were legally qualified candidates during the 1990 elections for various public offices in Florida.[1]

2. Complainants allege that Phipps impermissibly charged candidates rates that were higher than WCTV(TV)'s most favored commercial customers, unlawfully increased rates during the lowest unit charge ("LUC") periods, and engaged in practices designed to skirt the Commission's LUC requirements. Complainants further allege that Phipps engaged in rate discrimination at WCTV(TV) and violated the comparable use rate provisions of the Communications Act of 1934, as amended.[2]

3. For the reasons set forth below, it is concluded that none of the Complainants has established a *prima facie* case of any LUC violations by Phipps involving WCTV(TV) during the 1990 primary or general election periods.

I. PRIMA FACIE ANALYSIS

4. This matter is properly before the Bureau pursuant to *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling*"). The *Declaratory Ruling* set forth specific procedural requirements governing § 315(b) complaints.

5. In order to invoke the Commission's enforcement procedures, complainants who allege a violation of § 315(b) are required to make a *prima facie* showing of such violation. At a minimum, this showing must consist of a "short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-6663 (MMB), *modified*, 7 FCC Rcd 7199 (MMB), *rev. granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) ("*Lawton Chiles*"). A complainant may make a *prima facie* case by using generally-available industry or statistical data on average rates to show that the rate paid by a candidate was higher than the average rate charged by the station for the same class of time. *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47. The licensee may submit an answer to the complaint within ten days.

6. If, upon review of the complaint and answer (if filed), the Bureau determines that the complainant has established a *prima facie* case, the Bureau will issue an order giving the parties the opportunity to select one of two dispute procedures for resolving the complaint: mediation or disposition by the Bureau, subject to review by the Commission. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. Under either procedure, the complainant is entitled to limited discovery, subject to specific conditions set forth in the Bureau's order. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 23.

Lowest Unit Charge Allegations

7. Turning to the instant case, Complainants initially allege that Phipps violated the Commission's LUC requirements during the 1990 primary and general elections in connection with its use of a so-called "grid card" to sell time to political candidates. In support, Complainants provide a copy of a 1990 WCTV(TV) general election political rate card which contained six classes of time. Class 1 (the most expensive) was non-preemptible. Classes 2 through 6 (Class 6 being the least expensive) were immediately preemptible and varied in price based on the probability of

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[1] Chiles and Martinez were legally qualified candidates for the public office of Governor of Florida in the September 4, 1990, primary and November 6, 1990, general elections. Nelson was a legally qualified candidate for the public office of Governor of Florida in the September 4, 1990, primary election. Smith was a legally qualified candidate for the public office of Secretary of State of Florida in the September 4, 1990, primary and November 6, 1990, general elections.

[2] Section 315 provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b). *See also* 47 C.F.R. Section 73.1942(a).

preemption. Station WCTV(TV)'s use of a "grid card," Complainants argue, resulted in candidates being charged different rates for essentially the same class of time on WCTV(TV). By way of example, Complainants provide the following data:

Candidate	Date	Time Period	Rate	Class
Chiles	10/31/90	6:30-8:00 am	$ 60	6
Martinez	10/31/90	6:30-8:00 am	$ 75	4
Chiles	10/30/90	12:00-12:30 pm	$220	2
Martinez	10/30/90	12:00-12:30 pm	$ 90	4
Chiles	10/17/90	6:30-8:00 am	$160	3
Martinez	10/17/90	6:30-8:00 am	$ 70	5
Chiles	10/16/90	12:30-4:00 pm	$220	2
Martinez	10/16/90	12:30-4:00 pm	$100	4

8. Phipps acknowledges that WCTV(TV) used a rate card in 1990 which contained multiple levels of immediately preemptible time. However, Phipps maintains that in 1991 the Commission specifically endorsed such a practice, citing *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), *Erratum*, 7 FCC Rcd 920 ("*Report & Order*"), *recon. denied*, 7 FCC Rcd 4611 (1992) ("*Codification Order*"). Phipps contends that its 1990 "grid card" satisfied all requirements for multiple tiers of immediately preemptible time that the Commission subsequently established in its *Codification Order*. Phipps further argues that the Commission's 1991 action permitting the use of multiple classes of immediately preemptible time should be applied retroactively to the instant situation involving WCTV(TV). For the same reasons, Phipps maintains that none of the candidates was the subject of rate discrimination because each purchased a different class of immediately preemptible time.

9. In 1990, the relevant period in question, the Commission's policy, as first set forth in a 1988 *Public Notice*, was to recognize only one class of immediately preemptible time for LUC purposes. *See Public Notice*, 4 FCC Rcd 3823, 3824 (1988). In describing immediately preemptible time, the *Public Notice* stated that "[p]reemptibility enables the broadcaster to bump' an advertiser paying a lower preemptible rate in favor of an advertiser paying a higher preemptible rate . . . ." *Public Notice*, 4 FCC Rcd at 3823. However, the *Public Notice* further stated that preemptible with notice time constituted a separate class of time for lowest unit charge purposes. Preemptible with notice time was described as "an announcement that becomes non-preemptible if not preempted by a certain date . . . ." *Public Notice*, 4 FCC Rcd at 3824. Any doubt about the propriety of multiple classes of preemptible time -- with or without notice -- was eliminated in *Codification Order*, at 691. Therein, the Commission determined that its policy of treating all immediately preemptible time as a single class "does not appear to effectuate what Congress envisioned when it enacted § 315(b)." In concluding that its policy on classes of time "should be changed to reflect more accurately the realities of the advertising marketplace," the Commission adopted (and for the first time, codified in its rules) a new policy of allowing broadcasters to "establish and define their own reasonable classes of immediately preemptible time." For the same reasons, the Commission also determined that broadcasters should be allowed to establish reasonable classes of preemptible-with-notice time.

10. The 1988 *Public Notice* was not binding law, but was a statement of general policy that could be challenged in any subsequent proceeding such as this one, in which it was applied. In considering such a challenge, we note, as discussed above, that the Commission has determined that the 1988 policy did not appear to effectuate congressional intent underlying Section 315(b). Further, no equitable factors suggest we should, nevertheless, allow Complainants to receive the benefits of that policy. For example, the 1988 *Public Notice* did not reflect any long-standing Commission policy, nor is there any basis to believe that the candidates here relied upon it in deciding to purchase particular classes of time. Accordingly, even if the 1988 *Public Notice* precluded Phipps from establishing the separate classes of time reflected on its rate card, we would not continue to apply that policy because it does not comport with Congressional intent. *See generally, Williams Natural Gas Company v. FERC*, 3 F.3d 1544, 1553-1555 (D.C. Cir. 1993). Given the clarification of the Commission's policy on multiple classes of preemptible time in the *Codification Order*, we do not find that Complainants have established a *prima facie* case of overcharging in any of the above instances where candidates who purchased preemptible time (Classes 2 through 6) in the same daypart were charged disparate amounts.

11. The Bureau also concludes that Complainants have failed to establish a *prima facie* case of rate discrimination by Phipps. The equal opportunities and nondiscrimination provisions of § 73.1941(e) of the Commission's Rules [formerly § 73.1940(c)], which implements § 315(a) of the Communications Act of 1934, as amended, "are predicated on the philosophy that competing legally qualified candidates are entitled to equal treatment in the availability of political advertising and other broadcast time not exempt as *bona fide* news programming." *Independent Democrats for LaRouche*, 57 RR 2d 98, 102 (1984). In the instant case, none of the instances of alleged violations proffered by Complainants violate § 73.1941(e) because the rate charged to Chiles in each cited instance was for a different class of time than the class purchased by Martinez. Furthermore, the Complaint provides no instances of alleged rate discrimination with respect to Nelson or Smith. Consequently, it is concluded that Complainants have failed to establish a *prima facie* case, and the Complaint, to the extent it alleges rate discrimination by Phipps, is dismissed.

12. Complainants next allege that Phipps violated the LUC requirements of § 315(b) of the Communications Act of 1934, as amended, by charging rates for political advertisements on WCTV(TV) which exceeded "SCOOP"-based rates. SCOOP, the acronym for *Spot Cost Outlook and Projections*, a product of *Media Market Guide*, is a compilation of generally available statistical data on average rates charged by television stations. In support, Complainants state that they multiplied the average SCOOP rate for a given daypart in the Tallahassee, Florida, market[3] by the

[3] Although licensed to serve Thomasville, Georgia, WCTV(TV) is considered part of the Tallahassee, Florida market.

actual ratings on WCTV(TV). They then compared this station-specific SCOOP-based rate with the rates actually charged to two of the Complainants. Further, they compared the actual rates charged with a SCOOP-based average less 30% to reflect the discounts that they believe are charged to volume advertisers. The comparisons are depicted in the following chart:

Candidate: Chiles (10/13/90-10/18/90)

Time Period	Actual Charge ($)	Fourth Quarter Scoop ($)	SCOOP LESS 30% ($)
6:30-8:00 am	160	97	54
9:00-10:00 am	70	98	69
Noon-12:30 pm	220	152	106
12:30-4:00 pm	220	152	106
4:00-5:00 pm	220	186	130
7:00-7:30 pm	510	392	274

Candidate: Nelson (8/27/90-8/28/90)

Time Period	Actual Charge ($)	Third Quarter Scoop ($)	SCOOP LESS 30% ($)
6:00-6:30 am	70	56	39
6:30-8:00 am	100	77	54
9:00 am-Noon	40	92	64
Noon-12:30 pm	100	156	109
4:00-5:00 pm	130	168	118
5:00-5:30 pm	110	168	118
7:00-7:30 pm	540	310	217

13. Phipps argues that Complainants' comparison of actual rates charged to candidates with SCOOP-based averages is unreliable to establish a *prima facie* case of overcharging. In support, Phipps asserts, among other things, that Complainants have provided only a vague description of the methodology used in deriving the numbers depicted above.

14. We believe that Chiles and Nelson, the only candidates for whom statistics were provided, have failed to establish a *prima facie* case of overcharging based on SCOOP-based rates. Phipps is correct that Complainants have not provided a description of the methodology used in arriving at any of their rates. Indeed, Complainants do not reveal the ratings source upon which they relied (e.g., Arbitron or A.C. Nielsen Company ratings) or the multiplier used in calculating their station-specific figures. Absent this information, we are unable to conclude that Chiles or Nelson has made the showing necessary to establish a *prima facie* case.[4] Additionally, the complaint provides no reference to, or evaluation of, the rates charged to Martinez or Smith. Consequently, it is concluded that these individuals have failed to make a *prima facie* case, and the Complaint as to them, to the extent they allege overcharging by Phipps based upon SCOOP-based data, is dismissed.

15. Complainants further claim that Phipps unlawfully increased the preemptible rates charged to candidates during the 1990 general election period. In support, Complainants rely on "research" which purportedly reveals that the WCTV(TV) changed rates for political candidates more frequently than the 28-day rotation applicable to favored commercial advertisers. Phipps counters that the printed rates for candidates were in fact the lowest unit charge and remained constant throughout the period in question. Phipps suggests that the varying prices which Complainants characterize as "increasing," simply reflect the use of multiple classes of preemptible time.

16. We agree with Phipps. The Commission has long recognized that a station may increase its rates as the result of its normal business practices. *See Dianne Feinstein, John Seymour, Thomas Hayes, et. al (KABC-TV)*, 9 FCC Rcd 1586, 1588 (MMB 1994), *citing, Public Notice, Licensees and Cable Operators Reminded of Lowest Unit charge Obligation*, 4 FCC Rcd 3823 (1988). Furthermore, § 315 of the Act guarantees that during the relevant primary and general election periods, the most that a station may charge a qualified political candidate for public office is the lowest unit charge available to commercial advertisers for the same class and amount of time for the same period. Section 315 does *not* guarantee that a political candidate shall enjoy a fixed rate (*i.e.*, a rate that is "locked in" or "protected") for multiple spots over a specified period of time. *See also Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 693-94 (1991); *Public Notice, The Law of Political Broadcasting and Cablecasting*, 690 FCC 2d 2209, 2271 (1978); *Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 528-29 (1972). In determining the lowest unit charge, candidates must be given *all* discounts, including those based on volume and frequency, that are offered to the station's most favored commercial advertisers. Here, Complainants have not demonstrated that Phipps excluded long term commercial rates from WCTV(TV)'s LUC calculations. Additionally, Complainants have not shown by any specific examples that they paid more than a commercial advertiser -- long term or otherwise -- for a similar spot. Finally, Complainants have not demonstrated that the rates they were charged were based on illegal rate increases, rather than the purchase of different classes of time. Accordingly, it must be concluded that Complainants have failed to establish a *prima facie* case that WCTV(TV) unlawfully raised its preemptible rates during the 1990 general election period.

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[4] *Compare, Ann Richards, Clayton Williams, Jim Mattox, Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown*, DA 94-1113 (MMB, released October 17, 1994); *see also, Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 1662, n.8 (MMB, 1992) (Complainants cautioned to provide precise information about methodology involved in compiling rate information). We also note that Complainants' claim that SCOOP-based averages should be reduced by 30% is based on pure speculation and is, therefore, not credible. 7 FCC Rcd at 6662-6663 (MMB), *modified*, 7 FCC Rcd 7199 (MMB), *rev. granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992). In any event, Complainants' chart is highly suspect even if the concept of reducing SCOOP-based averages by 30% were credited. For example, a charge of $54 does not constitute a 30% reduction from $97, as Chiles alleges in the 6:30 -8:00 am time period. Also, the rates charged to Nelson in the 9:00 am-Noon, Noon-12:30 pm, and 5:00 -5:30 pm time periods do not exceed either the SCOOP-based average or the average reduced by 30%. Thus, it is unclear how this evidence, even if substantiated, could establish a *prima facie* case of overcharging.

17. Complainants also allege that, on several occasions, Phipps charged Nelson, Martinez, and Chiles more than the highest rate ($950.00) for a 30 second spot on WCTV(TV) specified in the 1990 edition of *Television and Cable Factbook*. We will reject this claim because it is predicated on a source of information that has not been shown by Complainants to be reliable insofar as making a *prima facie* case of overcharging is concerned. The 1990 edition of *Television and Cable Factbook* contains a disclaimer that the rate information therein was "updated to October 1, 1989." See Complaint, Exhibit 2. However, the instances of overcharging cited by Complainants occurred between August and November 1990. We do not believe that information which, in some cases, is more than a year old is sufficiently reliable to establish a *prima facie* case of overcharging. The information is simply too dated to have any probative value in this regard. Furthermore, Complainants do not reveal the method by which *Television and Cable Factbook* compiles information about station rates, and Phipps categorically states that WCTV(TV) does not provide information about its rates to the publication. Accordingly, Complainants' attempt to use the information in *Television and Cable Factbook* as a barometer for measuring Phipps' compliance with the Commission's LUC requirements is rejected. See *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WTVT(TV))*, 7 FCC Rcd 6661, n.10 (MMB 1992).

18. Complainants further allege that WCTV(TV) violated the Communications Act of 1934, as amended, by thrice broadcasting political advertisements for Martinez and Chiles back-to-back during the 1990 primary and general elections. Assuming, *arguendo*, that WCTV(TV) broadcast the political advertisements as alleged (a fact Phipps disputes), Complainants do not identify any particular provision in the Act which is implicated by WCTV(TV)'s actions. Indeed, we have specifically held that spot-separation policies are not considered relevant for purposes of § 315(b) of the Act. See *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WCIX-TV)*, 8 FCC Rcd 4019, 4023 (MMB 1993). Accordingly, the Complaint, insofar as it alleges a violation of the Act for WCTV(TV)'s failure to guarantee separation of spots, is dismissed.

19. Finally, Complainants allege that WCTV(TV) impermissibly charged political candidates higher rates than those charged to commercial advertisers during the "comparable use" period. See § 315(b)(2) of the Communications Act of 1934, as amended. However, Complainants provide absolutely no support for this claim which would permit a reasoned evaluation of the facts. Thus, it is simply impossible to determine whether Phipps charged Nelson and Martinez more for their political advertisements than WCTV(TV)'s commercial customers without any information whatsoever about the rates charged to the latter group. Moreover, no information is provided as to the rates charged to Chiles or Smith during the period in question. For these reasons, none of the Complainants have established a *prima facie* case of any violations by Phipps during the "comparable use" period.

20. ACCORDINGLY, IT IS HEREBY ORDERED, That the Complaint, filed May 29, 1992, by Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith against John H. Phipps, Inc., licensee of Station WCTV(TV), Thomasville, Georgia, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of KCSM-TV Channel 60 against Viacom Cable — CSR-4162-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1994; Released: December 27, 1994

By the Cable Services Bureau:

1. Station KCSM (Educ., Channel 60), San Mateo, California has filed a "Petition for Declaratory Ruling" with the Commission, claiming that Viacom Cable had refused to carry KCSM-TV's signal on its East Bay cable system, serving Pleasanton, Livermore, Dublin, San Ramon, Sunol and surrounding areas. KCSM-TV asserts that Viacom had previously acknowledged that KCSM-TV was a "qualified" must-carry station, but wanted KCSM-TV to agree to delay its carriage until Viacom had completed a system build through. KCSM-TV did not agree to this request. On December 30, 1993, an "Opposition to Complaint" was filed on behalf of Viacom Cable claiming that KCSM-TV's petition should be denied because it is "untimely." On January 25, 1994, a "Response to Opposition to Petition for Declaratory Ruling" was filed on behalf of KCSM-TV, disputing Viacom's claim that KCSM-TV's initial complaint was "untimely," and adding that Viacom's Opposition was itself late-filed.

2. Initially, we note that Section 76.7(d) of the Commission's rules specifies that comments or oppositions to must-carry complaints are to be filed within twenty days of their appearance on public notice. Since KCSM-TV's petition appeared on public notice on December 10, 1994, Viacom's opposition was timely filed. Pursuant to Section 76.58(b) of the Commission's rules, on April 30, 1993, Viacom Cable notified KCSM-TV that its designated principal headend was located in San Ramon, California (*see* Attachment to KCSM-TV's Petition). Subsequently, on July 16, 1993, Viacom Cable mailed out to KCSM-TV a copy of its channel line-up card, pursuant to Section 76.58(e) of the Commission's rules (*see* Exhibit 1 to Viacom's Opposition). By letter dated August 30, 1993, KCSM-TV requested carriage on Viacom's East Bay cable system (*see* Attachment to KCSM-TV's Petition). KCSM-TV received no response to this letter from Viacom. On October 21, 1993, KCSM-TV sent a second letter to Viacom, reiterating its request for carriage (*see* Attachment to KCSM-TV's Petition). Kurt Jorgensen, Vice-President of Viacom Cable, then contacted KCSM-TV by telephone on October 26, 1993. At this point, the two sides commenced negotiations concerning Viacom's carriage of KCSM-TV. During these negotiations, KCSM-TV states that Jonathan Marx, the General Manager of Viacom's system, acknowledged that KCSM-TV was a "qualified" station for mandatory carriage on its East Bay system but proposed that KCSM-TV wait for carriage until the system completed its buildthrough by the summer of 1995. KCSM-TV declined this offer and, in response, Viacom took the position that because KCSM-TV had failed to file a complaint sixty days from the "triggering event" of Viacom's April 30, 1993 headend notification, KCSM-TV had, in effect, waived its right to file a must-carry complaint with the Commission. KCSM-TV contended that it had not waived its right to file a complaint with the Commission and that the actual "triggering event" was not Viacom's headend notification, but rather was KCSM-TV's request for carriage on August 30, 1993. Therefore, according to KCSM-TV, Viacom was obligated to respond to its carriage request by November 1, 1993. Having failed to reach a mutually acceptable resolution, KCSM-TV filed a complaint with the Commission on November 16, 1993.

3. Pursuant to Section 615 of the Communications Act of 1934, as amended, a cable system's signal carriage obligation includes carriage of qualified NCE television stations. See 47 U.S.C. § 535; 47 C.F.R. § 76.56(a). There is no substantive disagreement herein between the parties as to KCSM-TV's eligibility for carriage as a must-carry station on Viacom's East Bay system. This dispute concerns the proper timing of the filing of KCSM-TV's original must-carry complaint with the Commission. In its Opposition, Viacom asserts that KCSM-TV was put on notice on July 16, 1993 that Viacom did not intend to carry KCSM-TV's signal on its East Bay system, when Viacom sent KCSM-TV its current channel line-up card, which specifically referred to the implementation of its "must-carry" requirements, and the line-up excluded KCSM-TV. Viacom claims that this "triggering event" constituted an "affirmative action" by Viacom, which caused KCSM-TV to become aware of Viacom's alleged violation of the must-carry provisions. Consequently, pursuant to the Commission's filing requirements, KCSM-TV was obligated to file a complaint with the Commission within sixty days of this event. Therefore, according to Viacom's interpretation of events, KCSM-TV should have filed a complaint with the Commission by approximately September 20, 1993. Because KCSM-TV did not file a complaint until November 16, 1993, Viacom asserts that this complaint is barred from consideration on its merits under the Commission's procedural filing requirements.

4. KCSM-TV counters, in its Response to Opposition, that the "triggering event" initiating the sixty day filing window for its complaint was not its receipt of Viacom's channel line-up card because its receipt of this card was not in response to a specific request from KCSM-TV either for the card itself or for carriage on Viacom's East Bay system. Instead, the channel line-up card received by KCSM-TV from Viacom was merely a list of stations currently carried by Viacom that all cable systems were required to send out to local stations, under the Commission's rules, by June 2, 1993. Furthermore, KCSM-TV maintains that if Viacom had truly considered that KCSM-TV's receipt of the line-up card mailed on July 16, 1993 was the actual "triggering event" to initiate the Commission's filing deadline for its complaint, it would not have entered into negotiations with KCSM-TV in October and November over KCSM-TV's carriage rights on Viacom's East Bay system. Therefore, KCSM-TV asserts that its petition should not be dismissed as untimely, but, rather, that the Commission should accept it for review on its merits.

5. The Commission's rules specify that must-carry complaints involving NCE stations, must be filed with the Commission within sixty days of the time when the complainant first believes that the cable operator has failed to comply with the must-carry rules. 47 C.F.R. § 76.7(c)(4)(iii). The Commission elaborated on this requirement in its rulemaking proceedings by stating that "[w]ith respect to NCE stations, no complaints will be accepted if filed more than 60 days after the station became aware, through some affirmative action of the cable operator, that such operator had allegedly violated the Act." *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2995 (1993). In footnote 356, the Commission further explained that,

> A written request by an NCE station to a cable operator for the list of must-carry stations contained in operator's public file will not be considered notification of a failure to comply with the Act. However, receipt by the NCE station of such a list (which the operator is required to provide within thirty (30) days of a request) may constitute the specific event triggering the 60 days time frame in which to file a complaint, if such list contains the information on which the NCE station will base its complaint.

The Commission also stated that "[a]n affirmative action. . . would include a denial from a cable operator in response to a demand by the station for either carriage or channel position, or *the failure to respond to such a demand within the required 30-day time frame* (emphasis added)." *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd at 2995. Moreover, the Commission requires an NCE station to follow the same procedures as provided for commercial stations when an NCE station chooses to notify a cable operator directly of a carriage-related dispute prior to filing a complaint with the Commission.

> With respect to an NCE station, although the statute gives the NCE station the right to directly file a complaint with the Commission, *it is anticipated, though not required, that if there is any question relating to the carriage obligations of the cable system, the NCE station will make inquiries of the cable system prior to filing a complaint. In the event the NCE station chooses to notify a cable operator of an alleged failure to comply with the Act, we believe it appropriate that they use the procedures outlined for commercial or LPTV stations. If it so chooses, the NCE station should also notify the cable operator that it is availing itself of those procedures and that it anticipates receiving a response from the cable operator within 30 days.* (emphasis added) In the event the NCE station chooses to avail itself of the plain language of the statute and file a complaint directly with the Commission without prior notification to the cable system, the NCE station must serve the cable system as provided in Section 76.7 of our rules.

Id. at 2994-95. Consequently, an NCE station following the procedures set out for commercial stations should also face the same filing requirements for carriage-related complaints (including deadlines and associated "triggering events") applicable to commercial stations.

6. The Commission's rules, however, as explained in its rulemaking proceedings, clearly encourage an NCE station to clarify and to resolve its carriage status with the cable operator *before* filing a must-carry complaint with the Commission. *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd at 2994-95, and para. 5, *supra*. Moreover, if an NCE station chooses to follow this strategy, it must provide the cable operator up to thirty days to respond to its request. *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd at 2994-95. This suggests that the "affirmative action" or "triggering event" necessary to initiate the Commission's filing deadline for a subsequent must-carry complaint should occur in relation to this process. Because NCE stations are allowed by the Commission to follow the same procedures outlined for commercial stations when attempting to resolve their carriage disputes directly with individual cable operators, we believe that the "affirmative action" or "triggering event" necessary to initiate the Commission's filing deadline regarding subsequent complaints should also be the same for NCE stations in this particular situation. *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd at 2994-95, and para. 5, *supra*.

7. Therefore, we agree with KCSM-TV that, because it had not requested carriage before it received Viacom's channel line-up card on July 16, 1993, KCSM-TV's receipt of this line-up card, without its prior solicitation, did not constitute an appropriate "affirmative action" or "triggering event" with regard to the filing deadline for KCSM-TV's must-carry complaint. It appears from the facts provided by the parties, instead, that Viacom's failure to respond to KCSM-TV's August 30, 1993 carriage request by September 29, 1993 (*i.e.*, thirty days after the request) was the actual "triggering event" that most closely conforms to the Commission's explanation of its rules concerning filing deadlines for must-carry complaints. *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd at 2995, and para. 5, *supra*. Therefore, in accordance with these rules, KCSM-TV had until November 28, 1993 (sixty days after the "triggering event") to file its complaint with the Commission. *See* 47 C.F.R. § 76.7(c)(4)(iii). Because KCSM-TV's complaint was filed with the Commission on November 16, 1993, KCSM-TV's complaint was timely filed and it will be accepted by the Commission for consideration on its merits.

8. Since there is no substantive dispute between the parties over whether or not KCSM-TV is a qualified local NCE station, entitled to mandatory carriage on Viacom's system under the Commission's rules, we believe that KCSM-TV has established that it is entitled to carriage on Viacom's East Bay system.

9. Accordingly, the petition filed on November 16, 1993 by KCSM-TV Channel 60 IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535(j)(3)) of the Communications Act, as amended, and Viacom Cable IS ORDERED to commence carriage of KCSM-TV on its East Bay system forty-five (45) days from the release date of this Order. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Michigan State University against Crystal Cable TV, Inc.	CSR-4011-M MI1364

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 27, 1994

By the Cable Services Bureau:

1. On May 25, 1994, Crystal Cable TV, Inc. ("Crystal"), operator of a cable system serving Crystal, Michigan, filed a letter with the Commission which we will treat as a petition for reconsideration. Crystal, in essense, requests that the Commission reconsider its December 15, 1993 action[1] ordering its Crystal, Michigan system to carry Station WKAR-TV (Educ., Ch. 23), East Lansing, Michigan. No opposition to this petition has been received.

2. In support of its request, Crystal states that it remeasured WKAR-TV's signal on May 25, 1994. It avers that this data indicates that WKAR-TV's signal strength was measured at -88 dBm, substantially below the level of-45 dBm required for mandatory carriage of UHF stations. In addition, Crystal submits a videotape of programming from WKAR-TV received on May 24 and 26, 1993, which substantiates the station's poor reception. Finally, Crystal maintains that since it already carries Station WCMU-TV (Educ., Ch. 14), Mt. Pleasant, Michigan, it shouldn't be required to carry another NCE station.

3. We are not persuaded by the arguments raised by Crystal. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. As stated in footnote 2 of our original Order, with respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. At standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF noncommercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, Crystal determined WKAR-TV's signal strength to be below the requisite level for a UHF commercial station. We find, however, that the cable system failed to follow generally acceptable engineering practices in making its determination. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. The underlying decision specificially cited these measurement requirements so that Crystal was specifically on notice as to their applicability. When measured against these criteria, we conclude that the test submitted by Crystal is insufficient to demonstrate that WKAR-TV's signal is not of "good quality" at the cable system's headend.

7. Further, we will generally not consider photographs, photographs of a video tape, or the video tape itself to establish the presence or absence of a good quality signal or must-carry purposes. We believe the videotaping, video playback equipment, television receiver as well as photographic equipment used may interject impairments (e.g., noise, equipment characteristics, color integration, etc.) which could make it difficult to judge whether the videotape or photograph accurately represents the station signal. Consequently, we will only consider such evidence as a supporting factor to properly performed engineering measurements.

8. Finally, §76.56(a)(1)(iii) of our rules requires that all

[1] *Michigan State University against Crystal Cable TV, Inc.*, 9 FCC Rcd 498 (1993).

cable systems with more than 36 channels, such as Crystal,[2] must carry a *minimum* of three NCE channels, but it does not preclude requiring such a system to carry additional NCE channels. Indeed, the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993) specifically states: "[s]ystems with a capacity of more than 36 usable activated channels are *generally required* to carry the signals of *all* qualified local NCE stations requesting carriage" (emphasis supplied). The only exception to this requirement is when there is substantial programming duplication between local NCE stations, a circumstance not raised herein.

9. Accordingly, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petition for reconsideration, filed May 25, 1994, IS DENIED and Crystal Cable TV, Inc. IS ORDERED to commence carriage of Station WKAR-TV within forty-five (45) days of the date of this Order. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[2] Commission records indicate that Crystal has a channel capacity of at least 40 channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of New Life Evangelistic Center, Inc. against Douglas Communications Corporation II	CSR-4074-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 27, 1994

By the Cable Services Bureau:

1. On September 20, 1993, a petition on behalf of New Life Evangelistic Center, Inc., licensee of Television Broadcast Station KNLJ (Ind., Ch. 25), Jefferson City, Missouri, filed a petition with the Commission alleging that Douglas Communications Corporation II ("Douglas"), had declined to carry the station, even though KNLJ is a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-395, 106 Stat. 1460 (1992), in the Columbia-Jefferson City, Missouri ADI, where the cable systems are located. Douglas is the operator of cable television systems serving the communities of Clark, Franklin, Freeburg, Hallsville, Higbee, Iberia, Keytesville, Lake Mykee, New Bloomfield, New Franklin, Otterville, Russellville, Stover, Sturgeon, Taos, Vienna and Westphalia, Missouri. An opposition to this complaint was filed October 27, 1993, on behalf of Douglas, to which KNLJ responded on November 9, 1993.

2. In support of its petition, KNLJ states that in a letter dated June 17, 1993, it notified Douglas of its election of must-carry status and informed the cable company of its failure to meet its signal carriage obligations on its various systems. KNLJ indicates that Douglas never responded directly to this letter, nor did it attempt to justify its lack of carriage. It also did not notify KNLJ of any copyright liability problems or provide potential copyright liability cost calculations. In fact, the only responses it has received, continues KNLJ, are: 1) a June 1, 1993, letter from Douglas which maintains that KNLJ's signal is not receivable on its Otterville, Missouri system due to the poor quality of its signal; and 2) a May 16, 1993, mailing which lists the stations carried on the various cable systems. KNLJ argues that Douglas has not complied with the signal strength measurement standards in its determination of poor signal quality in Otterville, but relied instead on a computer program calculation. KNLJ concludes that Douglas should be compelled to carry it on all of the listed systems.

3. In its opposition to the petition, Douglas states that the 16 referenced cable systems serve between 29 and 290 subscribers each and the addition of KNLJ would be extremely burdensome. In particular, it argues that the Westphalia system, which serves only 105 subscribers and has a usable channel capacity of 12 channels, is exempted from the must-carry requirement pursuant to §76.56(b)(1) of the Commission's rules, provided it does not delete an existing station. Its Otterville system, on the other hand, has no obligation to carry KNLJ since the station does not provide a good quality signal at the system's headend. Douglas maintains that it should not be required to make redundant and expensive measurements[1] especially since it has already provided such evidence through reliable computer program calculations[2] and neither the Commission nor Congress has ordered cable operators to follow specific procedures. The burden of cost for any further surveys, argues Douglas, should therefore shift to KNLJ. Finally, with regard to the remaining 14 systems, Douglas admits that under normal circumstances KNLJ would qualify for must-carry status. However, it continues, it will cost approximately $2,143.85 per system to add KNLJ[3] and would create havoc at many of Douglas small headends which would be forced to make accommodations for additional equipment at a cost per system of $450.00. Douglas argues that it simply cannot afford to add KNLJ at this time and remain viable unless either 1) KNLJ assumes the costs of adding its signal to the systems; or 2) the Commission permits Douglas to pass the costs of adding KNLJ through to their subscribers as external costs. Douglas also requests that in addition to allowing it to pass on costs, the Commission should also grant it 12 months, instead of 45 days, to accommodate KNLJ's carriage on the systems since it will take some time to obtain the capital needed and coordinate the necessary modifications. In conclusion, Douglas requests that the Commission deny KNLJ's request for carriage on its Westphalia and Otterville systems and grant carriage on the remaining systems only under the conditions described.

4. KNLJ's reply concedes that it is not a must-carry station with respect to the Westphalia system, but it contends that for the remaining systems, Douglas has not adequately justified its failure to add its station. KNLJ argues that despite the fact that the 1992 Cable Act has been in place for 13 months and the Commission's must-carry rules for 8 months, Douglas has done nothing to prepare to meets its carriage obligations nor has it even attempted to work with the station regarding its carriage. Moreover, KNLJ maintains that Douglas' claim of financial hardship is unsupported by any profit or loss statements and its attempt to place the costs of carriage on KNLJ is clearly contrary to the Commission's *Clarification Order in MM Docket No. 92-259*, 8 FCC Rcd 4142 (1993) at Para-

[1] Douglas estimates that it would cost its Otterville system, which serves only 136 subscribers, approximately $733.25, or $5.30 per subscriber, to take actual measurements of KNLJ's signal. Costs included would cover $208.25 for the antenna, $425.00 for a tower crew to raise the antenna and assist with measurements, and $100.00 for a Douglas technician.

[2] Douglas states that its computer program took into account the following factors: 1) the distance between KNLJ's transmitter site and Douglas' receive site; 2) KNLJ's transmitter antenna height and authorized power; 3) Douglas' receive site tower height; 4) the free space attenuation loss; and 5) earth curvature attenuation.

[3] Douglas estimates that more than half of that cost, $1,118.85, would be devoted to the purchase of equipment such as the antenna, signal processor, cable, preamplifier and power supply needed to carry KNLJ. An additional $575.00 per system would be necessary for the labor involved in raising and wiring the new antenna.

graph 11 where it states "cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking must-carry status." Finally, KNLJ states that Douglas is in error when it states that the Commission has never specified a precise description of the measurement techniques to be employed when determining poor signal quality. It points out that the Commission has done so in several decisions: *Channel 5 Public Broadcasting, Inc.*, 8 FCC Rcd 4953 (1993); and *Independence Public Media of Philadelphia, Inc.*, 8 FCC Rcd 6319 (1993). KNLJ contends, therefore, that since Douglas' showing does not meet this standard and it has provided no other, it has not justified its argument of poor signal quality on the Otterville system.

5. While we accept Douglas' assertion, along with petitioner, that it is not required to add KNLJ to its Westphalia system, we are not persuaded by the arguments raised regarding KNLJ's carriage on the remainder of its systems herein. The first issue involves Douglas' assertion that KNLJ provides poor signal quality at its Otterville headend. Section 614(h)(1)(b) (iii) of the Communications Act of 1934, as amended, provides the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. For UHF commercial stations, such as KNLJ, a standard of -45 dBm has been established. In this instance, Douglas determined KNLJ's signal strength to be below the requisite level for a UHF commercial station. However, the cable system failed to provide any engineering data to support its determination other than a statement that it reached this conclusion through the use of a computer program calculation. We cannot accept as valid Douglas' predicted computer measurements. In this instance, Douglas is required to take actual readings following good engineering practices. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend.

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determination reached by Douglas is insufficient to demonstrate that KNLJ's signal is not of "good quality" at the Otterville system's headend.

7. The carriage requirements found in the Commission's rules are derived directly from the 1992 Cable Act. In addition to this being a statutory requirement, Douglas has failed to provide any evidence, apart from conclusory statements, which demonstrate that complying with the must-carry requirements would potentially cause financial hardship to the system or its revenues. Moreover, KNLJ is correct in its assessment that Douglas' costs relative to its carriage cannot be passed back to the station except in instances where there is a proven signal quality problem. That is not the case on these 14 systems where not only is the issue of poor signal quality not raised, but Douglas concedes that KNLJ is a must-carry station. Further, Douglas has not provided an adequate justification for its request that we extend the required time in which it must add KNLJ. KNLJ's complaint has been on file with the Commission since September 20, 1993, and its original request for carriage submitted to Douglas as early as June 17, 1993. Therefore, Douglas has already had an extended period in which to accomplish any necessary changes to come into compliance with the rules.

8. The next issue deals with Douglas' request to pass on the costs of KNLJ's carriage to its subscribers. If Douglas attempts to justify its rates under a cost of service showing, Douglas could capitalize or reflect these costs as an expense, whichever would be appropriate, in its cost of service filing. If Douglas does not file a cost of service showing, increases to Douglas' permitted charges will be limited by the price cap mechanism. Under Section 76.922(d)(3)of the Commission's Rules, permitted charges for a tier may be adjusted to reflect changes in external costs of a cable system. According to these rules, "[e]xternal costs shall consist of costs in the following categories: (1) state and local taxes applicable to the provision of cable television service; (2) franchise fees; (3) costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority; (4) retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; and (5) other programming costs." 47 C.F.R. §76.922(d)(3)(iv). Our rules do not provide for other types of costs to be considered as external costs. We also note that Douglas has not filed a petition for special relief asking the Commission to impose different requirements under the Commission's rules which would allow a cable operator to treat these costs as additional types of external costs.

9. Accordingly, the petition filed September 20, 1993, by New Life Evangelistic Center, Inc. IS GRANTED, pursuant to §614 (d)(3) (47 U.S.C. §534) of the Communications Act of 1934, as amended, and Douglas Cable Communications Corporation II IS ORDERED to commence carriage of Station KNLJ forty-five (45) days from the release date of this Order in all of the listed communities except Westphalia, Missouri. This action is taken pursuant to authority delegated pursuant to §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Jovon Broadcasting Corp. against MetroVision, Inc. CSR-4234-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 27, 1994

By the Cable Services Bureau:

INTRODUCTION

1. On March 3, 1994, Jovon Broadcasting Corporation, licensee of Station WJYS (Ind., Channel 62), Hammond, Indiana, filed a "Must-Carry Complaint," pursuant to Section 76.61 of the Commission's Rules against MetroVision of DuPage County ("MetroVision"), alleging that MetroVision refused to carry WJYS on its systems serving Portage, Indiana and the following Illinois communities: Addison, Berwyn, Hickory Hills, Melrose Park, Midlothian, and Norridge. MetroVision filed an opposition to this complaint on April 12, 1994, to which WJYS replied on April 25, 1994.

SUMMARY OF PLEADINGS

2. According to WJYS, these communities are all located in the Chicago, Illinois area of dominant influence ("ADI"), as is WJYS, so the station is entitled to carriage on Channel 62 on all the systems, pursuant to Section 76.56 of the Commission's Rules. WJYS states that, although it notified MetroVision on July 29, 1993, that it was electing must-carry, instead of retransmission consent, it still was not being carried on these systems as of October 18, 1993. Since WJYS believes that MetroVision was required to commence its carriage on October 6, 1993, pursuant to the Commission's *Report and Order* in MM Docket No. 93-8, 8 FCC Rcd 5321, 5330 (1993), it contacted MetroVision by certified mail on November 2, 1993, repeating the station's election of mandatory carriage and requesting its prompt initiation. MetroVision's only response was by letter dated December 27, 1993, stating that ". . . we are reviewing your request and will respond accordingly." WJYS notes that it is an affiliate of the HSN Spree network.[1] WJYS adds that when the Commission issued the *Report and Order* in MM Docket No. 93-8, *supra*, it held that, consistent with Section 614(g)(2) of the Communications Act of 1934, as amended (47 U.S.C. 534(g)(2)), commercial broadcast stations licensed by the Commission, including those with home shopping formats, are entitled to mandatory carriage. Therefore, WJYS asks that the Commission order MetroVision to transmit its signal on the above cable systems within 45 days of this order.

3. In response, MetroVision argues that WJYS had once failed to meet the signal quality standards specified by Section 614(h)(1)(B)(iii) of the Communications Act of 1934, as amended (47 U.S.C. 534(h)(1)(B)(iii)) at its DuPage County principal headend. MetroVision adds that it informed WJYS of this by letter dated September 23, 1993, to which WJYS never responded. MetroVision also notes that none of the above communities are, in fact, served by MetroVision of DuPage County,[2] and it requests that the Commission dismiss WJYS's complaint on the grounds that it lacks proper notice regarding the correct systems, communities, and companies. Moreover, MetroVision argues that, Section 76.55(f) of the Commission's Rules exempts it from the requirement to add WJYS, since it presently carries another station affiliated with HSN, WEHS (Ind., Channel 60), Aurora, Illinois.[3] MetroVision adds that it transmits the HSN satellite service, which it claims (along with WEHS) substantially duplicates WJYS's programming.[4] Finally, MetroVision argues that it is in the process of rebuilding its Hickory Hills, Illinois system (which it states serves all of the communities specified by WJYS except for Portage), and it also plans soon to rebuild the MetroVision of DuPage County system. In the meantime, however, both systems are at full capacity, and requiring MetroVision to delete another channel in order to add WJYS now, with the requisite separate notices to subscribers and to stations, would only result in massive viewer confusion and disruption, substantial administrative burden and great expense to the systems.[5] Therefore, if the Commission orders carriage of WJYS, MetroVision requests that it defer the effective date of any such order until after it expands its systems' present channel capacity by completing their anticipated rebuilds.

4. In addition to its reply, WJYS also submitted its "First Amended Must-Carry Complaint" adding various communities to those it listed previously, all of which it states are located in the Chicago ADI and are served by the following MetroVision cable television systems: MetroVision of Indiana (serving the Indiana communities of Portage, Ogden Dunes, and Burns Harbor); MetroVision of Glendale Heights, Inc. (serving the Illinois communities of Bartlett, Bensenville, Bloomingdale, Carol Stream, Glendale Heights, Glen Ellyn, Itasca, Keeneyville, Medinah, Roselle,

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[1] According to WJYS, HSN 4 (also known as HSN Spree, formerly called HSN Overnight) provides its programming 24 hours daily to 112 television stations (including 70 full power and 42 low power stations) in more than 10 states.

[2] MetroVision lists the correct breakdown as follows: MetroVision of Illinois, Inc. (Berwyn, Illinois); MetroVision of Indiana No. 2, Inc. (Portage, Indiana); MetroVision of Southwest Cook County, Inc. (Midlothian and Hickory Hills, Illinois); and MetroVision Suburban Communications, Inc. (Norridge and Melrose Park, Illinois).

[3] Section 76.55(f) of the Rules defines a commercial television network for the purposes of mandatory signal carriage as ". . . an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states."

[4] According to Section 76.56(b)(5) of the Commission's Rules, for commercial must-carry purposes, "substantial duplication" is a situation where ". . .a station regularly simultaneously broadcasts the identical programming of another station for more than 50 percent of the broadcast week."

[5] MetroVision submits a letter supporting this position from the Village President of Posen, Illinois, James J. Adamek, Jr.

Westhaven, Wheaten, Wood Dale, and portions of Addison, West Chicago, and DuPage County); and MetroVision of Southwest Cook County, Inc. (serving the Illinois communities of Bellwood, Berwyn, Blue Island, Brookfield, Crestwood, Harwood Heights, Hickory Hills, Melrose Park, Midlothian, Norridge, Northlake, Orland Hills, Palos Hills, Posen, Stickney, Tinley Park, Wood Dale, and Worth). WJYS adds in its reply that each of these communities has now been served with a copy of its complaint, and that it is entitled to immediate carriage on each of the above systems, pursuant to Section 76.56 of the Rules, since they are all located in the Chicago ADI, regardless of whether or not they are in the process of being rebuilt and might have to remove other signals not entitled to mandatory carriage in order to accommodate it. WJYS also explains that, while it is affiliated with HSN 4 (also known as HSN Spree), WEHS is affiliated with HSN2.[6] Both of these services, according to WJYS, transmit separate, live programming 24 hours each day which is always different from that being transmitted by the other service.[7] Therefore, contrary to MetroVision's contention, neither service "substantially duplicates" the other, and each service constitutes a separate network for mandatory carriage purposes, pursuant to Section 76.55(f) of the Rules. In any event, WJYS notes that MetroVision's voluntary carriage of a satellite service such as HSN, whether or not duplicative of another signal, does not abrogate its must-carry obligations. Citing the Commission's prior decision in *The Applicability of 47 C.F.R. 73.658(g) and 47 C.F.R. 73.658(k) to Home Shopping, Inc.*, 4 FCC Rcd 2422, 2425 (1989), WJYS states that HSN 2 and HSN 4 constitute separate and distinct television networks, which was the Commission's rationale for waiving its dual network rule and permitting both WEHS and WJYS to be licensed to communities in the Chicago ADI, even though both stations are affiliated with HSN. Finally, WJYS notes that, since none of the communities where it is now seeking carriage is, in fact, served by the MetroVision of DuPage County headend (as MetroVision noted previously), the issue raised concerning MetroVision of WJYS's signal strength there is immaterial.[8]

DISCUSSION

5. The question which must be resolved in this proceeding is whether or not the programming provided by HSN2 and HSN4, respectively, to Stations WEHS and WJYS constitute separate networks. In support of its contention that they are not, Cablevision essentially maintains that the two services are one network, because they are owned by the same parent. If HSN2 and HSN4 are found to be one network, Cablevision need only carry Station WEHS, which is located closer to its cable system. Section 76.56(b)(5) of our Rules provides that cable operators need not carry duplicating affiliates of the same network. It does requires, however, that if a cable system chooses to carry only one affiliate, it must carry the one which is closer. In adopting this congressionally-mandated rule, the Commission stated that it would serve the public interest by preserving cable operator discretion, while at the same time insuring access by the public to diverse local signals, by requiring the system to carry only one of substantially duplicating signals. *Report and Order* in MM Docket No. 93-259, 8 FCC Rcd 2965, 2980 (1993).

6. In support of its request, WJYS cites the Commission's prior holding in *Home Shopping, Inc., supra*. A reading of this case reveals that the Commission concluded, in the context of its broadcast carriage rules, that waivers of its dual network and prime time access rules, if they applied, would not undermine the rules' purpose, due to the nature of HSN's programming. In any event, for the purposes of the Commission's must-carry rules, we find that HSN2 and HSN4 are separate networks. In this regard, it is undisputed that each transmits separate and distinct programming.[9] The mere fact that two programming sources, such as HSN2 and HSN4, are owned by the same parent and have similar formats is clearly not grounds for concluding that they are one network or that they necessarily show duplicative programming for the purposes of the Commission's cable television rules.[10]

7. Having found that the programming carried by WJYS and WEHS is provided by two separate networks, Cablevision is required to carry both stations, unless it can show that the stations' programming substantially duplicates each other. Section 76.56(b)(5) of the Commission's Rules. Since no program logs were submitted in this proceeding, WJYS' uncontroverted assertion that its programming does not substantially duplicate that of WEHS, within the meaning of the Commission's rules, is held to be dispositive of this issue. Furthermore, the fact that MetroVision either is in the process of, or is contemplating, rebuilding some or all of its systems is not sufficient to postpone its mandatory carrisge responsibilities, since not one of the three systems involved in the present case currently appears to be devoting one-third of its channel

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[6] As of December 1993, WJYS states that HSN 2 provided its programming 24 hours each day to 44 television stations (including 35 full power and 9 low power stations) in more than 10 states.

[7] To the extent that the stations do carry any programming that is the same simultaneously, WJYS states that it would be far less than the fifty percent of the broadcast week required by the Commission's substantial duplication exception to its commercial mandatory carriage provision.47 C.F.R. 76.56(b)(5).

[8] In this connection, we note that MetroVision has submitted no information or engineering data concerning the quality of WJYS's signal at the relevant headends for MetroVision's systems serving Glendale Heights, Southwest Cook County (including Hickory Hills), or Indiana (*see* n.2, *supra*), and that the data it did submit for its DuPage County headend is insufficient since it lacked such crucial information as the number of measurements taken over a 24-hour period, the date and time of day when the tests were made, the prevailing weather conditions then, the antenna's last calibration date, its range, orientation, and radiation pattern. *See Complaint of Lightning Broadcasting Company against Capital Cable Partners*, 9 FCC Rcd 2315, 2316 (1994).

[9] It is also undisputed that both HSN2 and HSN4 otherwise meet the Commission's definition for commercial networks, pursuant to Section 76.55(f) of the Rules.

[10] The referenced waiver granted in *Home Shopping Inc., supra*, involved the overlap of HSN2 (operating 24 hours a day) and HSN Overnight (operating from Midnight to 7 A.M.). HSN4, referenced in this proceeding, appears to be a successor to the HSN Overnight service, now operating as a full-time service. We do not consider in this proceeding any issue regarding the continued applicability of the Commission's previous waiver granted in *Home Shopping, Inc., supra*, to HSN4.

capacity to the retransmission of must-carry signals.[11] *See* 47 C.F.R. 76.56(b)(2). As the Commission previously stated when it adopted the *Report and Order*, 8 FCC Rcd at 2972: "(*i.e.*: a cable operator without a sufficient number of available channels may be required to drop a non-must-carry station or cable programming service to fulfill its must-carry obligations)."

ORDERING CLAUSES

8. In view of the foregoing, we find that grant of WJYS's complaint is in the public interest.

9. Accordingly, IT IS ORDERED, That the "Must-Carry Complaint" (CSR-4234-M) filed March 3, 1994, by Jovon Broadcasting Corporation, licensee of Station WJYS (Ind., Channel 62), Hammond, Indiana IS GRANTED in accordance with Section 614(d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, That MetroVision of Indiana, MetroVision of GlenDale Heights, Inc. and MetroVision of Southwest Cook County, Inc. SHALL CARRY the signal of WJYS on Channel 62 in the communities listed in para. 4, *supra*, in compliance with this Order within forty-five (45) days of its release date. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] According to the *Television & Cable Factbook, Cable Volume No. 62* (1994 Ed.), all three systems currently have 54 channel capacity, and they provide their subscribers with the following number of non-satellite broadcast signals: 10 (MetroVision of Glendale Heights); 13 (MetroVision of Southwest Cook County); and 15 (MetroVision of Indiana).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Jovon Broadcasting Corp. against Cablevision of Chicago — CSR-4205-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 27, 1994

By Cable Services Bureau:

INTRODUCTION

1. On February 1, 1994, Jovon Broadcasting Corporation, licensee of Station WJYS (Ind., Channel 62), Hammond, Indiana, filed a "Must-Carry Complaint," pursuant to Section 76.61 of the Commission's Rules against Cablevision of Chicago ("Cablevision"), alleging that Cablevision refused to carry WJYS on its systems serving the Illinois communities of Evanston, Downers Grove, and Oak Park. Cablevision filed an opposition to this complaint on March 10, 1994, to which WJYS replied on March 23, 1994.

SUMMARY OF PLEADINGS

2. According to WJYS, these communities are all located in the Chicago, Illinois area of dominant influence ("ADI"), as is WJYS, so the station is entitled to carriage on Channel 62 on all three systems, pursuant to Section 76.56 of the Rules. WJYS states that, although it notified the systems on July 29, 1993, that it was electing must-carry, instead of retransmission consent, it still was not being carried by them on November 1, 1993. Since WJYS believes that Cablevision was required to commence its carriage on October 6, 1993, pursuant to the Commission's *Report and Order* in MM Docket No. 93-8, 8 FCC Rcd 5321, 5330 (1993), it immediately contacted the systems by certified mail on November 2, 1993 to determine the reason for the delay, and it was then informed that, since they already carried Station WEHS (Ind., Channel 60), Aurora, Illinois, which transmits HSN 2 network programs, they did not believe that they were also required to add WJYS, which carries HSN 4 network programs.[1] WJYS notes that, while both HSN[2] and HSN 4[3] have 24-hour formats that include home shopping, entertainment, and informational programming, these programs are always different from each other,[4] and that WEHS and WJYS both provide their own locally produced and syndicated programming, when they aren't transmitting network programming. Citing the Commission's prior decision in *The Applicability of 47 C.F.R. 73.658(g) and 47 C.F.R. 73.658(k) to Home Shopping, Inc.*, 4 FCC Rcd 2422, 2425 (1989), WJYS states that HSN 2 and HSN 4 are separate and distinct television networks, which was the Commission's rationale for waiving its dual network rule and permitting both WEHS and WJYS to be licensed to communities in the Chicago, Illinois ADI, even though both stations are affiliated with HSN.

3. In opposition, Cablevision argues that is not required to add WJYS, since it is already transmitting another HSN affiliate, WEHS. Cablevision notes that WEHS is also licensed to a community within the Chicago, Illinois ADI, and that it is located closer to Cablevision's systems[5] than is WJYS; therefore, Cablevision states that WEHS is more likely to be responsive to the local needs and interests of Cablevision's subscribers than is the more distant station, WJYS. Citing the exemption in Section 76.56(b) of the Commission's Rules, Cablevision claims that it is not required to carry stations transmitting both HSN 2 and HSN 4, since they are both ultimately affiliated with the Home Shopping Network and constitute a single broadcast network for the purposes of mandatory signal carriage. According to Cablevision, this conclusion is supported by the Commission's previous decision in *Home Shopping, Inc.*, 4 FCC Rcd at 2424.

4. WJYS notes in reply that Cablevision has not disputed its contention that its programming is different from, and does not substantially duplicate, that of WEHS.[6] The mere fact that these two entities share common ownership in no way negates the fact that they are separate networks within the meaning of Section 76.55(f) of the Commission's Rules,[7] which WJYS claims the Commission previously recognized in its decision in *Home Shopping, Inc., supra.* WJYS adds that the Commission has also previously held that multiple telecasts of the same game with different announcers, cameras, and directors did not constitute du-

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[1] However, the system serving Homewood, Illinois operated by Cablevision added its signal, according to WJYS, pursuant to its letter of November 2, 1993.

[2] According to WJYS, as of December 1993, HSN 2 provided its programming live 24 hours each day to 44 television stations (including 35 full power and 9 low power stations) in more than 10 states.

[3] WJYS explains that HSN 4 is also sometimes known as HSN Spree, and that it is available live 24 hours each day to its 112 affiliate stations (which include 70 full power and 42 low power stations) in more than 10 states.

[4] To the extent that the stations carry any programming that is the same simultaneously, WJYS states that it would be far less than the fifty percent of the broadcast week required by the Commission's substantial duplication exception to its commercial mandatory carriage provision.47 C.F.R. 76.56(b)(5).

[5] Cablevision states that it also serves the following Illinois communities from its three headends in Evanston, Downers Grove, and Oak Park: Bedford Park, Bridgeview, Broadview, Burbank, Cicero, Forest View, Hodgkins, Justice, Lyons, McCook, Niles, North Riverside, River Forest, Stone Park, Summit, Willow Springs, Darien, Woodridge, Lincolnwood, and portions of unincorporated Cook County. Initially, Cablevision moved to dismiss WJYS's complaint for failure to serve the interested parties in these communities, as well as in the three headend communities, but WJYS rectified its oversight on March 23, 1994.

[6] Section 76.56(b)(5) of the Commission's Rules defines "substantial duplication" as a situation where "a station regularly simultaneously broadcasts the identical programming of another station for more than 50 percent of the broadcast week."

[7] A commercial television network for the purposes of mandatory signal carriage is defined by Section 76.55(f) of the Rules as " . . . an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states."

plicating "network programs" within the meaning of Section 76.5(m) of the Commission's Rules. *Major League Baseball*, 6 FCC Rcd 5573, 5575 (1991). Therefore, the total lack of duplication in programming between HSN 2 and HSN 4 clearly makes the two services different networks for the purposes of mandatory signal carriage, according to WJYS, which asks that the Commission order Cablevision to add its signal within 45 days of this Order.

DISCUSSION

5. The question which must be resolved in this proceeding is whether or not the programming provided by HSN2 and HSN4, respectively, to Stations WEHS and WJYS constitute separate networks. In support of its contention that they are not, Cablevision essentially maintains that the two services are one network, because they are owned by the same parent. If HSN2 and HSN4 are found to be one network, Cablevision need only carry Station WEHS, which is located closer to its cable system. Section 76.56(b)(5) of our Rules provides that cable operators need not carry duplicating affiliates of the same network. It does requires, however, that if a cable system chooses to carry only one affiliate, it must carry the closer one. In adopting this congressionally-mandated rule, the Commission stated that it would serve the public interest by preserving cable operator discretion, while at the same time insuring access by the public to diverse local signals, by requiring the system to carry only one of substantially duplicating signals. *Report and Order* in MM Docket No. 93-259, 8 FCC Rcd 2965, 2980 (1993).

6. In the instant case, both parties argue that the Commission's holding in *Home Shopping, Inc., supra*, supports their conflicting contentions. A reading of this case reveals that the Commission concluded, in the context of its broadcast carriage rules, that waivers of its dual network and prime time access rules, if they applied, would not undermine the rules' purpose, due to the nature of HSN's programming. In any event, for the purposes of the Commission's must-carry rules, we find that HSN2 and HSN4 are separate networks. In this regard, it is undisputed that each transmits separate and distinct programming.[8] The mere fact that two programming sources, such as HSN2 and HSN4, are owned by the same parent and have similar formats is clearly not grounds for concluding that they are one network or that they necessarily show duplicative programming for the purposes of the Commission's cable television rules.[9]

7. Having found that the programming carried by WJYS and WEHS is provided by two separate networks, Cablevision is required to carry both stations, unless it can show that the stations' programming substantially duplicates each other. Section 76.56(b)(5) of the Commission's Rules. Since no program logs were submitted in this proceeding, WJYS' uncontroverted assertion that its programming does not substantially duplicate that of WEHS, within the meaning of the Commission's rules, is held to be dispositive of this issue.

ORDERING CLAUSES

8. In view of the foregoing, we find that grant of WJYS's complaint is in the public interest.

9. Accordingly, IT IS ORDERED, That the "Must-Carry Complaint" (CSR-4205-M) filed February 1, 1994, by Jovon Broadcasting Corporation, licensee of Station WJYS (Ind., Channel 62), Hammond, Indiana IS GRANTED in accordance with Section 614(d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, That Cablevision of Chicago SHALL CARRY the signal of WJYS on Channel 62 in compliance with this Order within forty-five (45) days of its release date on its systems serving Evanston, Downers Grove, and Oak Park, Illinois. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[8] It is also undisputed that both HSN2 and HSN4 otherwise meet the Commission's definition for commercial networks, pursuant to Section 76.55(f) of the Rules.

[9] The referenced waiver granted in *Home Shopping Inc., supra*, involved the overlap of HSN2 (operating 24 hours a day) and HSN Overnight (operating from Midnight to 7 A.M.). HSN4, referenced in this proceeding, appears to be a successor to the HSN Overnight service, now operating as a full-time service. We do not consider in this proceeding any issue regarding the continued applicability of the Commission's previous waiver granted in *Home Shopping, Inc., supra*, to HSN4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Citizens Utilities Company
Permanent Cost Allocation Manual AAD 94-6
for the Separation of Regulated
and Nonregulated Costs

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 27, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 31, 1993, Citizens Utilities Company ("Citizens") filed a Cost Allocation Manual ("CAM") describing the procedures it uses to allocate costs between its regulated and nonregulated activities and the manner in which it accounts for transactions with affiliated companies.[1] Under the Commission's rules, CAMs are required to be filed by each local exchange carrier with annual operating revenue of $100 million or more.[2] On January 13, 1994, we solicited comments on Citizens' CAM.[3] No comments were filed. We have conducted our review of Citizens' CAM and subsequent revisions,[4] and we conclude that, while the CAM is deficient in some respects, its content and format generally provide the Common Carrier Bureau ("Bureau") with a sufficient understanding of Citizens' proposed cost allocation procedures. In this Order, we approve Citizens' CAM, subject to several conditions including the submission of further information.

2. In the *Joint Cost Order*, the Commission established a mechanism for separating the costs of regulated telephone services from the costs of nonregulated services. The purpose of the *Joint Cost Order* was to assure that regulated operations do not improperly subsidize nonregulated activities. The Commission established two separate but complementary sets of rules, one which governs how carriers allocate their costs between regulated and nonregulated activities and the other which governs transactions between carriers and their affiliates. The Commission required that carriers file CAMs setting out in detail the manner in which they propose to implement those cost allocation and affiliate transaction rules.

3. The *Joint Cost Order* promulgated standards and guidelines for carriers to follow in developing their cost allocation practices. That Order established a hierarchy of cost apportionment methods with emphasis on the direct assignment of costs and the use of cost-causative allocation methods. First, whenever possible, costs in each Part 32 USOA[5] (Uniform System of Accounts) account must be directly assigned to either regulated or nonregulated activities. If costs in an account cannot be directly assigned, they are considered common costs and they must be placed in cost pools which are homogeneous categories designed to facilitate the allocation of costs. The costs in these pools must then be allocated between regulated and nonregulated activities using a factor or formula which is called an allocator. Although the *Joint Cost Order* did not prescribe specific allocators for each cost pool, it established guidelines for the use of cost-causative allocation methods. Whenever possible, common costs must be directly attributed based upon direct analysis of the origin of the costs themselves. Common costs that cannot be directly attributed must be indirectly attributed based on an indirect, cost-causative linkage to another cost pool or group of cost pools for which a direct assignment or attribution is available. If direct or indirect measures of cost-causation are not available, the cost pool must be allocated using a prescribed general allocator. The general allocator is the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities.[6]

4. Section 64.903 of the Commission's rules,[7] requires that a CAM include the following elements: (a) a description of each carrier's nonregulated activities; (b) a list of all incidental activities and the justification for treating each activity as incidental; (c) a chart showing all of the carrier's corporate affiliates; (d) a statement that describes affiliates that engage in or will engage in transactions with the carrier and that describes the nature, terms, and frequency of such transactions; and (e) for each Part 32 USOA account, a detailed description of the cost pools to which amounts in the account will be assigned and the basis on which each cost pool will be allocated.[8] In addition, ten of the accounts must be assigned to cost pools and allocated using specific procedures prescribed by the Bureau in the *CAM Uniformity Order*.[9] Finally, the CAMs must contain a description of the carrier's time reporting procedures including the methods used to allocate nonproductive time.[10]

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[1] The Commission established principles and rules governing the accounting separation of carriers' regulated and nonregulated costs in the *Joint Cost Order*. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*) *recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[2] 47 C.F.R. §64.903.

[3] Carriers and NECA File Cost Allocation Manual Revisions, Citizens Utilities Files Initial CAM, 9 FCC Rcd 254 (1994).

[4] Citizens made CAM filings on March 30, 1994 and June 29, 1994.

[5] 47 U.S.C. Part 32 - Uniform System of Accounts for Telecommunications Companies.

[6] 47 C.F.R. §64.901(b); see *Joint Cost Order*, 2 FCC Rcd at 1318-19.

[7] This rule was adopted in the *Computer III Remand Order*. *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991).

[8] 47 C.F.R. §64.903.

[9] Implementation of Further Cost Allocation Uniformity, Memorandum Opinion and Order, 8 FCC Rcd 4664 (1993) (*CAM Uniformity Order*).

[10] 47 C.F.R. §64.903. This requirement is necessary to safeguard against the misallocation of labor costs. Nonproductive time includes: vacation, sick leave, breaks, administrative activi-

5. The Bureau has established uniform filing requirements for the CAMs.[11] In accordance with these requirements, the CAMs must include the following information: (a) a list of all nonregulated products and services that Citizens provides; this list must indicate the accounts that are associated with each product or service; (b) a list of each type of affiliate transaction in which Citizens engages; this list must indicate which affiliate is involved with each type of transaction; and (c) a list of each type of time reporting method which Citizens uses; this list must indicate which groups of employees use each type of reporting method.

6. In Section II of this Order, we discuss each section of Citizens' CAM in the following sequence: (A) Nonregulated Activities; (B) Incidental Activities; (C) Affiliate Transactions; (D) Cost Allocation Tables; and (E) Time Reporting. In Section III of this Order, we discuss procedural issues that will govern submission of revisions required by this Order and the routine submission of future revisions.

II. DISCUSSION

A. Nonregulated Activities

7. The Citizens CAM includes the "nonregulated activities" matrix that describes six nonregulated, revenue-producing activities. These activities are: Customer Premises and Network Channel Terminating Equipment; Inside Wire Installation and Maintenance; CallCentral; Microwave and Cellular Maintenance Services; Telemarketing; and Signal Transfer Point Leased Capacity. Generally, Citizens' CAM provides adequate descriptions of these services. We have two concerns, however, related to Citizens' description of its nonregulated activities. First, in this section of the CAM, Citizens does not offer assurances that it is charging the tariffed rates for services used in connection with nonregulated activities.[12] Citizens states in the description of Microwave and Cellular Maintenance Services that it does not provide any network transmission in connection with that service.[13] The CAM, however, does not indicate whether or not transmission or other tariffed services are provided in connection with Citizens' other nonregulated activities. We direct Citizens to revise its CAM to clarify for each of its nonregulated activities whether tariffed services are used in the provision of that nonregulated activity. If tariffed services are used, the description of the nonregulated activity should indicate that these services are provided at tariffed rates.

8. Our second concern relates to Microwave and Cellular Maintenance Services and Telemarketing Services. The CAM states that these nonregulated activities are provided in conjunction with an affiliated company. To the extent that Citizens' performs these activities for third parties on behalf of Citizens' nonregulated affiliates, or as part of an agreement with these affiliates, they constitute affiliate transactions. Therefore, these transactions must also be listed in the affiliate transaction section of the CAM. The terms of these transactions must comply with the Commission's affiliate transaction rules. We direct Citizens to revise its CAM to meet these requirements.

B. Incidental Activities

9. The Citizens CAM contains a list of nonregulated activities that are offered on an incidental basis to regulated activities. In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that each meets the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the revenues from all of a carrier's incidental activities must not exceed one percent of its total revenues.[14] The Citizens CAM lists six activities that it treats as incidental: land and building space rental; pole contact and conduit space rental; incidental custom work; operator services not covered by tariff; customer list sales for equal access; and scrap material. Our review of this section of the CAM indicates that Citizens has met the requirements of the *Joint Cost Order*.

C. Affiliate Transactions

10. The *Joint Cost Order* established specific rules that govern the provision of assets and services to and from affiliates. These rules were created to prevent carriers from circumventing the cost allocation rules and engaging in transactions in which they provide assets or services to affiliates, or obtain assets or services from affiliates, at prices that ultimately result in unfair rates being charged to ratepayers. Section 32.27 of the Commission's rules defines how carriers are to record affiliate transactions in their books of account.[15] These rules distinguish between transactions involving the transfer of assets and the provision of services. The transfer of assets between affiliates must be recorded at the prevailing prices established through third party arms'-length transactions. If no prevailing price is available, asset transfers from an affiliate to the carrier must be recorded at the lower of net book cost or fair market value, and asset transfers to an affiliate from the carrier must be recorded at the higher of net book cost or fair market value. The provision of services must be recorded at the tariff rate, or prevailing price if one exists. Absent a prevailing price, the cost of the service must be recorded at costs that are determined in a manner consistent with the cost allocation requirements of Section 64.901 of the Commission's rules.[16]

11. In its CAM, Citizens provides a chart of its affiliates, a list of each type of affiliate transaction in which Citizens engages, and the nature, terms, and frequency of these

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ties and conferences; informal instructions to fellow employees working on other projects; and countless other activities that are not directly related to the employee's designated project.

[11] Responsible Accounting Officer Letter No. 19, 6 FCC Rcd 7536 (1991)(RAO Letter 19).

[12] In the introduction section of its CAM, where it describes the accounting treatment of nonregulated activities, Citizens states that when a nonregulated activity uses a tariffed service, that service is provided at a tariffed rate. The description of each nonregulated activity listed in the nonregulated activities section of the CAM, however, should contain a statement indicating whether that particular nonregulated activity involves the use of a tariffed service.

[13] Citizens CAM, Section II, pg. 2.

[14] *Joint Cost Order* at 1308.

[15] 47 C.F.R. §32.27.

[16] On October 20, 1993, the Commission released a *Notice of Proposed Rulemaking* to reevaluate its affiliate transaction rules.

transactions. We have three concerns related to Citizens' affiliate transactions. First, we are concerned about transactions involving the provision of nonregulated services from Citizens to its affiliates. The Citizens CAM states that it provides nonregulated services to its affiliates at prevailing list price, or in the absence of prevailing list price, at fully distributed cost.[17] This statement implies that Citizens provides nonregulated services to its affiliated companies. Citizens, however, does not list any such transactions in its CAM. If Citizens does provide nonregulated services to any of its affiliates, these transactions must be listed in the affiliate transaction section of the CAM along with the nature, terms, and frequency of these transactions. The terms of these transactions must comply with the affiliate transaction rules. We require Citizens to revise its CAM to include transactions involving each nonregulated service that it provides to an affiliated company.

12. Our second concern relates to the description of real estate services that Citizens provides to its affiliate, Francis Land and Water. The CAM states that "Citizens provides services related to the use of owned or leased building space and other space related support services at fully distributed cost."[18] The exact nature of these services is unclear. In its revisions, Citizens must clarify the types of services that it provides to this affiliate.

13. Finally, we detect some discrepancies between the activities described in the narrative portion of the affiliate transaction section and the activities listed in that section.[19] For example, according to the CAM the following affiliated companies provide engineering services to Citizens: Citizens Utilities Company-SAO; Telecom Management Services; and Western Region Telephone Operations. According to the narrative description of affiliate transactions, however, the only company providing engineering services to Citizens is Western Region Telephone Operations. Also, the list of financial services provided to Citizens by Citizens Utilities Company-SAO includes cash management. Cash management, however, is not included in the list of financial services appearing in the affiliate transaction section. That section does list treasury as a financial service that Citizens Utilities Company-SAO provides to Citizens. We are unable to determine whether these services are identical. We direct Citizens to review the affiliate transaction section of its CAM to ensure that all activities described in the narrative are also listed with the same descriptive title.

D. Time Reporting

14. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important allocator, it was imperative that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers were therefore permitted to propose the use of positive time reporting or exception time reporting,[20] or to develop special studies of employee time. The *Joint Cost Order* required that carriers include in their manuals a description of the methods used to teach, monitor, and enforce accurate time reporting. In addition, carriers must describe methods used to collect the costs of nonproductive time[21] and the methods used to allocate those costs.[22]

15. Citizens' CAM contains information concerning its time reporting procedures. The CAM discusses time reporting procedures by employee group. According to the CAM, all employees use positive time reporting. The CAM states that both productive and nonproductive time are reported with nonproductive time reported to specific function codes. The CAM contains a matrix that shows, for each employee group, the method Citizens uses to allocate employee time between its regulated and nonregulated activities. From our review of Citizens' time reporting section we conclude that Citizens must provide additional information on its time reporting procedures.

16. First, Citizens must specify the time increments it will use for its positive time reporting system. Then, Citizens must specify in detail the methods that it will use to capture nonproductive time and to allocate this time between its regulated and nonregulated activities. It is not clear how Citizens would report all nonproductive time to specific function codes. It is also unclear how Citizens would allocate nonproductive time between its regulated and nonregulated activities. All nonproductive time should be allocated between regulated and nonregulated activities in the same proportion as productive time.

17. The CAM mentions nonproductive time only in relation to two employee groups: operations and engineering personnel and customer operations personnel. Regarding customer operations personnel, the CAM states that nonproductive time is included in the common cost pool for Account 6623, Customer services. There are, however, two common cost pools in this account, and we are unable to determine which pool includes nonproductive time. Further, in the CAM's discussion of other employee groups there is no mention of nonproductive time. We direct Citizens to revise this section of its CAM so that it clearly states Citizens' methods of identifying and allocating nonproductive time for all employee groups. We also direct Citizens to apportion nonproductive time between regulated and nonregulated activities in the same proportion as productive time.

When a final rule is adopted, the Commission's affiliate transaction rules could be extensively modified. *See Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions Between Carriers and Their Nonregulated Affiliates*, CC Docket 93-251, 8 FCC Rcd 8071 (1993).

[17] Citizens CAM, Section V, pg. 1.

[18] Citizens CAM, Section V, pg. 2.

[19] *Id.*, Section V, pp. 2-6.

[20] In positive time reporting, an employee's day is parcelled into increments of time, typically six minutes to one hour in length. The employee then accounts for all or most of the time worked during a given day by dividing the total amount of hours worked among the specific jobs or functions performed. Under exception time reporting, an employee's time is assumed to be devoted entirely to one or more jobs or functions in which the employee is normally engaged. The employee actively reports only the time spent on activities that depart from the expected schedule.

[21] *See supra*, para. 4, n.10.

[22] *Joint Cost Order* at 1321-1322.

E. Cost Allocation Tables

18. In its CAM, Citizens describes the methods it proposes to use to derive cost pools, as well as the methods it proposes to use for allocating costs between regulated and nonregulated activities. Citizens then provides a table, organized by USOA account, that describes how it will use its cost pool apportionment and cost allocation methods to isolate nonregulated costs. We have several concerns with respect to the cost pool apportionment and cost allocation methods for individual accounts presented in that table. Before addressing concerns related to specific individual accounts, however, we will address some problems that relate to several of the accounts.

1) Official Communications

19. The Commission's rules require that nonregulated activities be charged tariffed rates for services that are offered under tariff.[23] Although the affiliate transaction section of the CAM states that Citizens provides tariffed services at tariffed rates to its affiliates, it is unclear whether Citizens proposes to apply tariffed rates to determine the "official communications",[24] costs of its nonregulated activities. Assuming that official communications services are identical to services offered under tariff, the Commission's rules require the application of the tariffed rate. In amendments to its CAM, Citizens must explain its proposed treatment of official communications costs and how that treatment is consistent with the Commission's rules.

2) Apportionment methods

20. Citizens uses "directly" assigned wages and salaries to allocate costs between regulated and nonregulated activities in several accounts.[25] We disagree with the use of this allocator for certain cost pools because it excludes other relevant salaries and wages, *e.g.* those "directly and indirectly attributable" salaries and wages.[26] For example, Citizens states that it uses "directly assigned" salaries and wages to apportion costs in the compensated absences cost pool of Account 1439, Deferred charges. Compensated absences costs, however, relate to all wages and salaries, not just those wages and salaries that are "directly" assigned. Consequently, we believe that compensated absences costs should be allocated based on the sum of directly assigned, directly attributed and indirectly attributable[27] wages and salaries. The exclusion of any relevant salaries and wages from the apportionment would result in inaccurate allocations between regulated and nonregulated activities. We direct Citizens to review the above accounts and revise its CAM so that allocations based on salaries and wages include all relevant directly assigned, directly attributable and indirectly attributable salaries and wages.

3) Use of studies

21. Citizens' CAM describes several studies used to divide costs into pools and to allocate costs between regulated and nonregulated operations. Although we find that for most of these studies Citizens has satisfied the Commission's requirements, we find that in some instances, Citizens has failed to provide the level of detail necessary for us to determine whether particular studies are sound. We require Citizens to submit additional information and amendments to correct these deficiencies. In many cases, the amendments we will require Citizens to make are clarifications of its allocation methods. In other cases, we need additional information so that we can determine whether a particular allocation method is sufficiently cost-causative.

22. We need additional information on the following special studies used to divide costs into pools: the motor vehicle usage special study; the land usage special study; the general purpose computer usage special study; the motor vehicle expense special study; and the land and building expense special study. The description of the motor vehicle usage special study states that the investment in motor vehicles is apportioned among eight cost pools based on the activity, or function, for which a particular vehicle is used. Citizens, however, provides no information on the method it uses to identify the use of these vehicles. Citizens must state whether it uses property records, logs, functional accounting codes or other methods to identify usage and how it uses each method to identify the usage of these vehicles. In addition, Citizens must state how often this study is performed. In its description of the land usage special study, Citizens must also state how often this study is performed.

23. According to its CAM, Citizens would use its general purpose computer usage special study and its leased general purpose computer usage special study to determine the percentage of investment in computers to be assigned to its cost pools. Citizens appears to be allocating a share of individual computers' costs to its "directly assigned" cost pools. Under our rules, however, the cost associated with an individual computer can be directly assigned to regulated or nonregulated activities if, and only if, the computer is used exclusively for regulated or nonregulated activities.[28] Otherwise, it must be assigned to a common cost pool. Citizens must revise its CAM accordingly.

24. In its business office activity special study, Citizens explains that the study begins with an analysis of the activities performed by all business office employees. The CAM states that, where necessary, the analysis is supplemented by measurements that include a count of the various types of activities performed during a representative period, weighted by the average time spent on each of these activities, and further weighted by the average number of employees concurrently engaged in each activity. Citizens

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[23] 47 C.F.R. §64.901(a)(1).

[24] The term "official communications" applies to telephone service and other communications systems that the company uses for internal purposes.

[25] Citizens uses this allocator in the following accounts: 1439 - Deferred Charges, 2122 - Furniture, 2123 - Office Equipment, 2124 - General Purpose Computers, 2681 - Capital Leases, 4340 - Net Noncurrent Deferred Operating Income Taxes, and 6121 - Land and Building Expense.

[26] *CAM Uniformity Order*, at 4665.

[27] Direct assignment occurs when the costs of assets or resources are incurred in providing either regulated service exclusively or nonregulated service exclusively. Direct attribution occurs when common costs are allocated between regulated and nonregulated activities based on direct measures of cost-causation or direct analysis of the origin of the cost themselves. Indirect attribution occurs when common costs are allocated between regulated and nonregulated activities based on indirect measures of cost-causation.

[28] *Order Inviting Comments*, 7 FCC Rcd at 6689.

must explain its criteria for determining when supplemental measurements are necessary. Citizens must also explain how it develops the representative time periods.

25. Citizens lists three studies that it uses to allocate costs between its regulated and nonregulated activities: its network administration service order dispatch and completion activity special study; its repair ticket special study; and its business office service order activity special study. It is not clear whether in each of these studies Citizens would use all of the service orders or repair tickets for a given period of time, or a representative sample of these items. The CAM uses the term "representative period" to describe the time period the studies will cover, but does not define what the "representative period" is. In order for us to determine if these studies are valid and reliable, Citizens must describe the criteria it would use for selecting a study period and what statistical sampling techniques it will employ. In its revisions, Citizens must revise its description of these studies to provide us with the requested information and any other data that will help us ensure that these studies will both be valid and reliable.

4) Account-By-Account Analysis

Accounts 2003 - Telecommunications Plant under Construction-Short Term, 2004 - Telecommunications Plant under Construction-Long Term, 2005 - Telecommunications Plant Adjustment

26. In these accounts Citizens uses an analysis of property records to apportion costs among pools. Citizens does not state, however, how often this analysis is performed. Citizens must provide this information for each of these accounts.

Account 2111 - Land

27. Citizens proposes nine cost pools for this account. In the *CAM Uniformity Order*, the LECs were required to establish a regulated cost pool and a nonregulated cost pool for amounts that could be directly assigned to regulated and nonregulated activities and a common cost pool for costs that require allocation.[29] The common cost pool is allocated to regulated and nonregulated activities based on the proportion of the regulated and nonregulated investment in Account 2121, Building. Citizens must revise the apportionment of this account to comply with the *CAM Uniformity Order*.

Account 2112 - Motor Vehicles

28. In its cost pool structure for this account, Citizens follows the *CAM Uniformity Order* requirements. The allocators that Citizens uses for the common cost pools in this account, however, do not comply with that order. In the *CAM Uniformity Order*, the LECs were required to establish a regulated cost pool and a nonregulated cost pool for amounts that could be directly assigned to regulated and nonregulated activities and six common cost pools for costs that require allocation. Five of these cost pools are for motor vehicles used for specific activities: central office; distribution services; network operations; customer operations; and corporate operations. The sixth cost pool is the motor pool and it contains those vehicles that are used for multiple activities. These common cost pools must be allocated based on current year salaries and wages in certain accounts specified in the order. Citizens allocates these pools based on the relative portion of directly assigned salaries and wages. The *CAM Uniformity Order*, however, specified the use of the current year salaries and wages and did not limit salaries and wages to only those that are directly assigned. In addition, Citizens does not include all the accounts specified by the *CAM Uniformity Order* in the salaries and wages allocator for the central office and distribution services costs pools. In its CAM, Citizens must revise the salaries and wages allocators for each of the common cost pools in this account so that they will comply with the *CAM Uniformity Order*.[30]

Account 2121 - Buildings

29. In its cost pool structure for this account, Citizens follows the *CAM Uniformity Order*. Citizens, however, uses allocators for the common cost pools in this account that do not comply with that order. In the *CAM Uniformity Order*[31] the Bureau required the LECs to establish a regulated cost pool and a nonregulated cost pool for buildings that are used entirely for regulated and nonregulated activities. The LECs were also required to establish seven common cost pools. Two of these cost pools, common regulated and common nonregulated, are for costs associated with portions of buildings that are rented to others and are treated as regulated or nonregulated. The other common cost pools are for costs associated with portions of buildings that are used for specific activities: central office; distribution services; network operations; customer operations; and corporate operations. Generally the *CAM Uniformity Order* requires that these cost pools be allocated based on the relative portion of regulated and nonregulated current year salaries and wages in certain specific accounts excluding those salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities. The central office cost pool, however, is allocated on the basis of the relative portion of the regulated and nonregulated investment in the central office investment accounts, excluding investment in central office equipment in buildings that are directly assigned to regulated or nonregulated activities.

30. Citizens allocates the common pools in this account based on the relative portion of directly assigned salaries and wages. The *CAM Uniformity Order*, however, specified the use of the current salaries and wages and did not limit salaries and wages to only those that are directly assigned. Also, Citizens does not state that it excludes from these allocators the salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities. Furthermore, in the central office cost pool, Citizens does not state that its allocator excludes the investment in central office equipment in buildings that are directly assigned to regulated or nonregulated activities. In its CAM Citizens must revise the allocators for each of these common cost pools so that they will comply with the *CAM Uniformity Order*.

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[29] *CAM Uniformity Order*, at 4667.
[30] *Id.*, at 4667-4668.
[31] *CAM Uniformity Order* at 4666.

Account 2321 - Customer Premises Wiring

31. According to Part 32 of the Commission's rules, Account 2321 includes amounts associated with embedded inside wire capitalized prior to October 1, 1984.[32] Citizens directly assigns this account to nonregulated operations. The CAM states that the account contains costs associated with investment in station apparatus that is used entirely for the provision of nonregulated service. Part 32, however, requires that station apparatus be included in Account 2311, Station apparatus. We direct Citizens to reclassify this investment to Account 2311 or justify its inclusion in Account 2321.

Account 2682 - Leasehold Improvements

32. Citizens proposes one cost pool for this account that it will allocate on the basis of the relative investment in the associated primary plant account. This method does not appear to be a reasonable allocator because improvements made to leased property may have little to do with the relative investment in owned property in the associated plant account. Therefore, we require Citizens to use a more cost-causative basis such as an analysis of its leasehold improvements to determine the regulated and nonregulated allocations.

Account 2690 - Intangibles

33. Citizens proposes one cost pool for this account that would be allocated between regulated and nonregulated activities based on its investment in telecommunications plant in service, Accounts, 2111-2682.[33] We find, however, that Citizens should be able to identify the costs within this account that can be directly assigned to either regulated or nonregulated activities. We therefore direct Citizens to establish three cost pools: "directly assigned regulated;" "directly assigned nonregulated;" and "common." We further direct Citizens to develop a cost-causative allocator for the common cost pool.

Account 4120 - Other Accrued Liabilities

34. Citizens proposes three cost pools for this account: "common wages and salaries related," which is allocated based on wages and salaries; "nontelecommunications," which is directly assigned to nonregulated activities; and an unspecified "shared" cost pool, which is allocated based on the investment in A Accounts 2001 through 2005.[34] We are unable to determine if the proposed allocation method for the "shared" cost pool is reasonable because we cannot ascertain the nature of the costs that are included in this pool. We direct Citizens to describe the nature of the items included in the "shared" cost pool in detail. In addition, we require Citizens to clarify whether the "wages and salaries related" cost pool includes costs related to compensated absences.

Account 5230 - Directory Revenue

35. Citizens directly assigns Account 5230 to regulated operations. In the *Yellow Pages Order*, however, we required local exchange carriers to segregate the regulated and nonregulated revenues included in this account.[35] Therefore, we require Citizens to establish a cost pool for nonregulated directory revenue. If Citizens has no such revenue, we require it to include a statement to that effect in the comments column of the cost table.

Accounts 5301 - Uncollectible Revenue - Telecommunications and 5302 Uncollectible Revenue - Other

36. The Part 32 rules require that uncollectible revenue be included in Accounts 5301 and 5302. Citizens, however, proposes to book uncollectible revenue associated with nonregulated activities directly to Account 5280, Nonregulated revenue. We direct Citizens to use Accounts 5301 and 5302 for all uncollectible revenue. We also require that Citizens apportion these accounts based upon the associated revenue.

Account 6311 - Station Apparatus Expense, 6341 - Large Private Branch Exchange Expense and 6362 - Other Terminal Equipment Expense

37. Citizens proposes four cost pools for these accounts: regulated; nonregulated; no access/no trouble found; and common. The *CAM Uniformity Order* requires three cost pools: regulated; nonregulated; and common-no access/no trouble found. We direct Citizens to revise the pools for this account to eliminate the additional common pool so that it will comply with the *CAM Uniformity Order*.[36]

Accounts 6424 - Submarine Cable Expense, 6425 - Deep Sea Cable Expense and 6426 - Intrabuilding Network Cable Expense

38. Although Citizens' CAM indicates that it has no investment in Accounts 2424 - Submarine Cable, 2425 - Deep Sea Cable, and 2426 - Intrabuilding Network Cable (and it proposes no allocation procedures for these accounts), it does propose allocation procedures for the associated expense accounts (Accounts 6424, 6425, and 6426). We direct Citizens to explain this anomaly.

Accounts 6512 - Provisioning Expense, 6534 - Plant Operations Administration Expense, 6535 - Engineering Expense, 6114 - Special Purpose Vehicles Expense, and 6116 - Other Work Equipment Expense

39. These accounts are primarily clearing accounts and, while residual expenses do remain in these accounts, a large portion of these expenses should be cleared prior to the cost allocation process. We direct Citizens to clarify in the comments column of these accounts that it will clear these expenses before performing its cost allocation operations.

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[32] *See* 47 C.F.R. §32.2321.

[33] These accounts represent the investment in telecommunications plant in service.

[34] These accounts are: 2001 - Telecommunications plant in service, 2002 - Property held for future telecommunications use, 2003 - Telecommunications plant under construction - short term, 2004 - Telecommunications plant under construction - long term, 2005 - Telecommunications plant adjustment.

[35] *See* Local Exchange Carriers Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, 8 FCC Rcd. 3105 (1993) (*Yellow Pages Order*).

[36] *CAM Uniformity Order*, at 4668.

Account 6611 - Product Management

40. Citizens divides this account into directly assigned regulated, directly assigned nonregulated, and two common cost pools: the joint development cost pool and the common cost pool. Citizens proposes to divide the joint development cost pool equally between regulated and nonregulated activities. We direct Citizens to justify this allocation method and to explain the distinction between its common cost pool and its joint development cost pool.

Account 6623 - Customer Services

41. Citizens proposes a common cost pool that will include three functions: billing; collection; and revenue accounting. Citizens proposes to allocate this cost pool to regulated and nonregulated activities on the basis of relative amounts of regulated and nonregulated revenue. We do not object to the use of this allocator for billing and revenue accounting costs. In order to determine whether relative revenue is a reasonable allocator for costs of collection, we require Citizens to explain in detail what collection costs it includes in this common pool.

Accounts 6711 - Executive and 6712 - Planning

42. Citizens proposes one cost pool for each of these accounts. It proposes to allocate these accounts based on the sum of the directly assigned cost pools in the general and administrative expense accounts and all costs in the plant specific operations expense, plant non-specific operations expense, and customer operations expense accounts.[37] We believe that Citizens' proposal is inconsistent with the *Joint Cost Order* which calls for direct assignment of costs to the fullest extent prior to any allocation. Furthermore, it is not clear that Citizens' proposed allocation method is reasonable for apportioning the common costs. We direct Citizens to justify the use of this allocator or to develop a more cost-causative allocator for these two accounts. In addition, we direct Citizens to assign costs in these accounts directly to regulated or nonregulated activities to the maximum extent possible using time reporting or other appropriate methods.

Accounts 6721 - Accounting and Finance and 6722 - External Relations

43. Citizens proposes three cost pools for each of these accounts: regulated; nonregulated; and common. The first is directly assigned to regulated; the second is directly assigned to nonregulated; and the common cost pool is allocated based on the sum of the directly assigned cost pools in the general and administrative expense accounts, and all costs in the plant specific operations expense accounts, the plant non-specific operations expense accounts and the customer operations expense accounts. It is unclear why this would be a cost-causative allocation procedure. We direct Citizens to justify further the use of this allocator for its common cost pool or to propose a more cost-causative allocator.

Account 6725 - Legal

44. Citizens proposes three cost pools for this account: regulated, nonregulated and common. The first pool is directly assigned to regulated activities and the second pool is directly assigned to nonregulated activities. Citizens proposes to apportion the common cost pool using the general allocator.[38] We find the relative amounts of directly assigned costs in this account would be a more cost causative allocator for apportioning the common costs in this account and direct Citizens to use it.

Account 6726 - Procurement

45. Citizens proposes one cost pool for this account, which it allocates on the basis of the investment in telecommunications plant in service, Accounts 2111 through 2690. Section 32.6726 of the Commission's rules states that this account includes costs incurred in procuring material and supplies, including office supplies. For this reason we require Citizens to explain why the allocator for this account is restricted to plant-in-service accounts. Citizens incorrectly identifies the allocation method for this account as direct assignment. In its revisions, Citizens must also correct this error.

Account 6727 - Research and Development

46. Citizens has not provided for the allocation of this account in its CAM. We direct Citizens to include this account in its revised CAM.

Account 7250 - Provision for Deferred Operating Income Taxes - Net

47. Citizens proposes one cost pool for this account which it allocates based on Account 4100, Net current deferred operating income taxes and Account 4340, Net noncurrent deferred operating income taxes. This is inconsistent with Bureau orders that require income tax accounts, such as Account 7250, to be allocated based on book income.[39] Therefore, we direct Citizens to revise its CAM to allocate this account based on book income.

Account 7510 - Interest on Funded Debt, 7530 - Amortization of Debt Issuance Expenses and 7540 - Other Interest Deductions

48. Citizens proposes one cost pool for each of these accounts. This cost pool is allocated to regulated and nonregulated activities based on the investment in telecommunications plant in service, Accounts 2111 through 2690. Account 2681, Capital Leases, is included in this allocation factor. Interest on capital leases is not included in Accounts 7510, 7530, or 7540. Consequently there is no cost-causative basis to include Account 2681 in the allocator for these accounts. Therefore, we require that Citizens eliminate Account 2681 from the allocator in Accounts 7510, 7530, and 7540.

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[37] The plant specific operations expenses are included in Accounts 6112 through 6441; the plant nonspecific operations expenses are included in Accounts 6510 through 6565; the customer operations expenses are included in Accounts 6611 through 6623; and the general and administrative expenses are included in Accounts 6721 through 6728.

[38] *See supra*, para. 3.

[39] Book income is operating book income before taxes and minus interest expense. *See e.g.*, Ameritech Operating Companies Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988).

Account 7520 - Interest Expense - Capital Leases

49. Citizens proposes one cost pool for this account which it allocates on the basis of the investment in telecommunications plant in service, Accounts 2111 through 2690. The relative investment in owned plant is not an appropriate allocator for interest expense associated with capital leases. The interest expense associated with capital leases should be allocated based on the investment in the associated account, Account 2681, Capital Leases. Citizens must revise its CAM accordingly.

III. PROCEDURAL ISSUES

50. In this section we address the submission of a revised CAM that complies with this Order and the routine submission of future amendments to the CAM.

51. In this Order, we have required Citizens to amend its CAM extensively, clarifying and changing many of its cost pool apportionment and cost allocation procedures. We have also directed Citizens to submit additional information concerning its affiliate transactions, nonregulated activities, and time reporting mechanisms. Citizens must submit a revised CAM that incorporates the changes we have required. These revisions will be subject to notice and comment as required by the *Joint Cost Order*.[40] We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. All revisions that are approved or ordered shall be made retroactive to January 1, 1994.

52. When filing CAM revisions, Citizens must adhere to RAO 19 and Section 64.903 of the Commission's rules. RAO 19 establishes uniform filing procedures for carriers filing CAM revisions, and requires that CAM revisions be accompanied by a transmittal letter and a matrix of changes. Among other requirements, the matrix must specify each change to the CAM and state the reasons for each change. Because we have required Citizens to make numerous revisions and clarifications, for purposes of this Order, the matrix must contain a sufficient level of detail for us to analyze Citizens response to each issue raised in this Order. All revised language in the CAM must be in bold-faced type and must be indicated by a vertical line in the right margin. Citizens must file four copies of its revised CAM with the Office of the Secretary and one copy must be delivered to the Chief, Accounting and Audits Division of the Bureau.

53. Citizens must update its CAM at least quarterly. And, if Citizens has no revisions, it must file a letter stating that fact. A complete CAM is only required on December 31 of each year, and whenever specifically required by direction of the Bureau or Commission.

IV. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), and Section 0.291 of the Commission's rules, 47 CFR Section 0.291, that the Cost Allocation Manual filed by Citizens Utilities Company IS APPROVED, subject to the conditions noted in this Order.

55. IT IS FURTHER ORDERED, that revised copies of the Cost Allocation Manuals shall be submitted within 60 days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[40] *Joint Cost Order* at 1327.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-155

In the Matter of

Amendment of Section 73.202(b), RM-8468
Table of Allotments,
FM Broadcast Stations.
(Big Pine Key, Key Colony Beach,
Naples and Tice, Florida)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 15, 1994; Released: December 27, 1994

By the Chief, Allocations Branch:

Comment Date: February 17, 1995
Reply Comment Date: March 6, 1995

1. The Commission has before it the petition for rule making filed by Gulf Communications Partnership ("petitioner"), permittee of Station WAAD(FM), Channel 229A, Tice, Florida, requesting the substitution of Channel 229C2 for Channel 229A at Tice, and the modification of its construction permit to specify operation on the higher class channel.[1] In order to accomplish the upgrade at Tice, petitioner also requests the substitution of Channel 283C for 284C at Big Pine Key, Florida, and the modification of Station WWUS(FM)'s license to specify Channel 283C;[2] the substitution of Channel 267C2 for Channel 288C2 at Key Colony Beach, Florida, and the modification of Station WKKB(FM)'s construction permit to specify Channel 267C2;[3] and the substitution of Channel 284A for Channel 228A at Naples, Florida, and the modification of Station WNOG(FM)'s license to specify Channel 284A.

2. We believe the proposal warrants consideration, since the proposed substitution of Channel 229C2 for Channel 229A at Tice would provide that community with a wide coverage area FM service. In addition, the substitution of Channel 284A for 228A at Naples will enable Station WNOG(FM) to operate as a 6 kilowatt station. Channel 229C2 can be allotted to Tice in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 14.8 kilometers (9.2 miles) southwest,[4] in order to avoid a short-spacing to Station WGYL(FM), Channel 229C2, Vero Beach, Florida, and Station WLVE(FM), Channel 230C, Miami Beach, Florida. Channel 284A can be allotted to Naples, Florida, in compliance with the Commission's minimum distance separation requirements at its presently licensed site,[5] with a site restriction of 8.5 kilometers (5.3 miles) east. Channel 283C can be allotted to Big Pine Key, Florida, in compliance with the minimum distance separation requirements at its presently licensed site,[6] with a site restriction of 7.1 kilometers (4.4 miles) west. Channel 267C2 can be allotted to Key Colony Beach, Florida, in compliance with the minimum distance separation requirements at its construction permit site.[7]

3. In accordance with Section 1.420(g) of the Commission's Rules, we shall propose to modify the construction permit for Station WAAD(FM), without entertaining other expressions of interest in the use of Channel 229C2 at Tice, Florida, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we are issuing *Show Cause Orders* to Palmer Broadcast Group, licensee of Station WNOG(FM), Channel 228A, Naples, Florida; Crain Broadcasting, Inc., licensee of Station WWUS(FM), Channel 284C1, Big Pine Key, Florida; and Richard L. Silva, permittee of Station WKKB(FM), Key Colony Beach, Florida, to show cause why their respective licenses and\or construction permits should not be modified as proposed herein.

4. The Commission's policy is not to entertain proposals which involve more than two substitutions of channels occupied by existing stations unless the petitioner dem-

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[1] Petitioner's request was originally filed with the Commission on March 31, 1994. By letter dated September 14, 1994, the Allocations Branch returned the petition for violation of the policy set forth in *Columbus, Nebraska*, 59 RR 2d 1184 (1986). *See infra* para. 4.

[2] Crain Broadcasting, Inc. ("Crain"), licensee of Station WWUS(FM), Big Pine Key, Florida, filed an application to retain full Class C status (BPH-870302MQ). The Commission returned its application and downgraded the allotment to Channel 284C1. Crain filed an Application for Review of the Commission's action returning the application. The Commission denied Crain's appeal. *See Memorandum Opinion and Order*, 8 FCC Rcd 4406 (1993). Crain filed a Petition for Reconsideration of the order denying the Application for Review, which is now pending.

[3] The construction permit for Station WKKB(FM), Channel 288C2 was modified in MM Docket 93-136 to specify operation on Channel 280C2. See *Report and Order*, 9 FCC Rcd 4051 (1994). A conflict exists between the petitioner's proposed substitution of Channel 283C at Big Pine Key and the allotment of Channel 280C2 at Key Colony Beach in MM Docket 91-136. To resolve this conflict, petitioner proposes to substitute Channel 267C2 at Key Colony Beach for Channel 280C2. Although two petitions for reconsideration are now pending in that proceeding, a staff engineering analysis reveals that the petitions for reconsideration should not bar the instant petition for rulemaking. We will serve the parties in MM Docket No. 91-136.

[4] The coordinates for Channel 229C2 at Tice are North Latitude 26-36-21 and West Longitude 81-57-10.

[5] The coordinates for Channel 284A at Naples are North Latitude 26-07-21 and West Longitude 81-43-22.

[6] The coordinates for Channel 283C at Big Pine Key are North Latitude 24-39-38 and West Longitude 81-25-10. As indicated in note 2 *supra*, a petition for reconsideration is pending on the downgrading of the Big Pine Key allotment from Channel 284C to Channel 284C1. If the Commission retains Channel 284C1 at Big Pine Key, we would substitute Channel 283C1 at Big Pine Key to accommodate the upgrade at Tice. However, if the Commission were to reconsider its decision and allot Channel 284C at Big Pine Key, we would then substitute Channel 283C in this proceeding.

[7] The coordinates for Channel 267C2 at Key Colony Beach are North Latitude 24-42-25 and West Longitude 81-06-17.

onstrates that special factors involving significant public interest benefits are present or that an assurance of agreement among the affected stations to the proposal are reached in advance of the filing of the petition. *See Columbus, Nebraska*, 59 R.R. 2d 1184 (1986). Originally, the staff dismissed Gulf's rulemaking petition because it required three stations to change channels and their consent had not been advanced. Gulf contends that the *Columbus Policy* is not violated because one of the three channels is an authorized, but unbuilt station. We agree and find that, under the present circumstances, this proposal can be entertained since the requested substitutions would affect only two existing stations. *See, e.g., Dyersburg, Tennessee, Jonesboro, Hoxie and Newport, Arkansas*, 2 FCC Rcd 7466 (1987). The outstanding construction permit at Key Colony Beach represents an unbuilt station. Petitioner served Richard D. Silva, the permittee, with a copy of the proposal which constitutes notice.

5. Petitioner also argues that because Richard L. Silva, the permittee of Station WKKB, holds a construction permit for an "unbuilt station" and is not yet licensed no "costs" are required to be reimbursed, citing *Dyersburg, Tennessee, supra*. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). However, if Richard L. Silva, the permittee for Key Colony Beach can establish costs that directly concern the frequency change, then it could claim reimbursement. *See Burkesville and Russell Springs, KY, Cookeville and Spencer, TN*, 5 FCC Rcd 677 (1990). Petitioner has stated its willingness to reimburse the licensees of Station WNOG at Naples and Station WWUS at Big Pine Key for the reasonable costs associated with their change in channels. Petitioner also states that it will reimburse the permittee at Key Colony Beach for the reasonable costs incurred for changing its frequency, if the cost can be established.

6. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Tice, Florida	229A	229C2
Big Pine Key, Florida	284C	283C
Key Colony Beach, Florida	280C2	267C2
Naples, Florida	228A	284A
	233C, 276C3	233C, 276C3

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Palmer Broadcast Group, licensee of Station WNOG (FM), Channel 228A, Naples, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 284A in lieu of Channel 228A.

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Crain Broadcasting, Inc., licensee of Station WWUS (FM), Big Pine Key, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 283C or 283C1 in lieu of Channel 284C or 284C1.

9. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Richard L. Silva, permittee of Station WKKB(FM), Key Colony Beach, Florida, SHALL SHOW CAUSE why its construction permit should not be modified to specify operation on Channel 267C2 in lieu of Channel 280C2.

10. Pursuant to Section 1.87 of the Commission's Rules, Palmer Broadcast Group, Crain Broadcasting, Inc., and Richard L. Silva may, not later than **February 17, 1995**, file a written statement showing with particularity why its license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Palmer Broadcast Group, Crain Broadcasting, Inc., and Richard L. Silva to furnish additional information. If Palmer Broadcast Group, Crain Broadcasting, Inc. and Richard L. Silva raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Palmer Broadcast Group, Crain Broadcasting, Inc. and Richard L. Silva will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the abovementioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

William J. Silva, Esq.
Blair, Joyce & Silva
1825 K Street, N.W., Suite 510
Washington, D.C. 20006
(Counsel to Richard L. Silva
Permittee of WKKB(FM)

Nancy L. Wolf, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(Counsel to Palmer Broadcast Group
Licensee of WNOG(FM)

Richard L. Silva
35 Sommbrero Blvd
Marathon, FL 33050
(Permittee for Station WKKB(FM))

Key Chain, Inc.
5500 W. W. 98th Paris
Miami, FL 33156
(Licensee for Station WAVK(FM))

Richard M. Riehl, Esq.
Haley, Bader & Potts
4350 N. Fairfax Drive, Suite 900
Arlington, VA 22203-1633
(Counsel for Crain Broadcasting
Licensee of WWUS(FM))

James M. Weitzman
Allan G. Moskowitz
Kaye, Scholer, Fierman
Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Attorney for Spanish Broadcasting
System of Florida Licensee of Station WZMQ(FM))

Crain Broadcasting
740 Rush Street
Chicago, IL 60611
(Licensee of WWUS(FM)

Palmer Broadcast Group
12800 University Drive, Suite 500
Fort Myers, FL 33907
(Licensee of WNOG(FM))

John J. McVeigh, Esq.

Robert J. Rini & Evan Carb

Multinational Legal Services, P. C. 11 Dupont Circle, N. W., Suite 700 Washington, D.C. 20036 (Counsel to Key Chain, Inc., Licensee of WAVK(FM))	Rini & Coran, P. C. 1350 Connecticut Avenue, N.W., Suite 900 Washington, D.C. 20036 (Attorneys for Joint Petitioners)

12. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **February 17, 1995**, and reply comments on or before **March 6, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kathleen Victory
Howard M. Weiss
Fletcher, Heald & Hildreth
1300 N. 17th Street, 11th Floor
Rosslyn, VA 22209
(Counsel for Gulf Communications Partnership)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-156

In the Matter of

Amendment of Section 73.202(b) RM-8564
Table of Allotments,
FM Broadcast Stations.
(Hawesville, Kentucky and)
Tell City, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 15, 1994; Released: December 27, 1994

Comment Date: February 17, 1995
Reply Comment Date: March 6, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WLME, Inc. ("petitioner"), licensee of Station WKCM-FM, Channel 289A, Hawesville, Kentucky, proposing the substitution of Channel 246A for Channel 289A at Hawesville, Kentucky, and the modification of Station WKCM-FM's license accordingly. To accommodate the substitution, petitioner also proposes the substitution of Channel 289A for Channel 245A at Tell City, Indiana, and the modification of Station WXSC(FM)'s construction permit accordingly. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that the proposed Class A channel substitution will enable Station WKCM-FM to increase its facilities to six kilowatts at its presently authorized site. To accommodate the channel substitution, petitioner also states that permittee of Station WXSC(FM) at Tell City, Indiana, has consented to this change.[1]

3. We believe the public interest would be served by proposing the substitution of Channel 246A for Channel 289A at Hawesville, Kentucky, since it would allow Station WKCM-FM to increase its power to six kilowatts. An engineering analysis has determined that Channel 246A can be allotted to Hawesville, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.7 kilometers (2.3 miles) northeast at petitioner's licensed site.[2] Additionally, Channel 289A can be allotted to Tell City, Indiana, in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.0 kilometers (7.5 miles) south in order to avoid short-spacings Station WASE(FM), Channel 288A, Fort Knox, Kentucky, and to the licensed and application sites of Station WQNF(FM), Channel 290A, Valley Station, Kentucky.[3]

4. In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter site, WLME, Inc. has provided a copy of an agreement with Carolyn S. Hagedorn, permittee of Station WXSC(FM) consenting to the change in her transmitter site, as well as the proposed change in channel of operation to accommodate the modification of Station WKCM-FM's license. WLME, Inc. also states its willingness to reimburse the permittee of Station WXSC(FM) for reasonable expenses incurred in relocating to Channel 289A. Although an *Order to Show Cause* to Carolyn S. Hagedorn is not required in view of her agreement and consent to WLME, Inc.'s modification request, we will serve her with a copy of this *Notice*.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hawesville, Kentucky	289A	246A
Tell City, Indiana	245A	289A

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested a copy of this *Notice* to:

Carolyn S. Hagedorn
Bradley & McCulloch, P.A.
5100 Indian School Road, N.E.
P.O. Box 26447
Albuquerque, New Mexico 87125-6447
(Permittee of Station WXSC(FM))

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **February 17, 1995**, and reply comments on or before **March 6, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washing-

[1] Petitioner notes that on January 23, 1992, Carolyn S. Hagedorn, permittee of Station WXSC(FM), filed for an extension of her construction permit (File No. BMPH-920123JP), an Application for Review, filed October 12, 1994, of the Commission's denial of that extension request is now pending. In the event the application is denied and the construction permit cancelled, petitioner submits that the proposed channel substitutions may be made since the Tell City allotment would be vacant.

[2] The coordinates for Channel 246A at Hawesville are North Latitude 37-55-33 and West Longitude 86-43-19.

[3] The coordinates for Channel 289A at Tell City are North Latitude 37-51-12 and West Longitude 86-43-14.

ton, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaints of Fouce	CSR-4272-M
Amusement Enterprises, Inc.	CSR-4273-M
against Falcon Cable TV	
Thousand Oaks, California	CA0850
Agoura Hills, California	CA1187
Malibu, California	CA0249

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 27, 1994

By the Cable Services Bureau:

INTRODUCTION

1. On June 17, 1994, Fouce Amusement Enterprises, Inc. ["KRCA"], licensee of Television Broadcast Station KRCA (Ind., Channel 62), Riverside, California, filed the captioned petitions requesting mandatory carriage of its signal on the cable television systems operated by Falcon Cable TV ["Falcon"] serving Thousand Oaks, Agoura Hills, and Malibu, California. The petitions were placed on public notice on July 12, 1994. Falcon filed a consolidated opposition to these petitions on August 1, 1994, and KRCA replied on August 15, 1994.

SUMMARY OF PLEADINGS

2. In support of its petitions, KRCA states that both its city of license and the communities in question served by Falcon are in the Los Angeles area of dominant influence (ADI). As a full power commercial television station, notes KRCA, it is entitled to carriage on Falcon's systems unless the station fails to deliver a signal of sufficient strength to Falcon's principal headends.[1] KRCA states its belief that it provides a signal to Falcon's principal headends of at least -45dBm, as required by the Communications Act of 1934, as amended.[2] However, KRCA notes, Falcon sent the station a letter suggesting that this was not the case, though without providing any evidence for this assertion. This, notes KRCA, is "in direct contravention of the Commission's rules and policies," citing, *inter alia*, the *Clarification Order in MM Docket No. 92-259*, 8 FCC Rcd 4142, 4143 (1993) and *Complaint of Greater Dayton Public Television against MW-1 Cable Systems*, 9 FCC Rcd 230 (1993). Nevertheless, states KRCA, despite Falcon's failure to cooperate with KRCA, the station has offered to cover the costs of any equipment needed to provide a signal of adequate strength to Falcon's principal headends.

3. In opposition to KRCA, Falcon states that its Agoura Hills system contains 36 activated channels, 12 of which are already used to carry commercial must-carry stations, and that Falcon therefore need not carry KRCA pursuant to §614(b)(1)(B) of the Communications Act[3] and §76.56(b)(2) of the Commission's Rules.[4] With respect to Thousand Oaks and Malibu, Falcon states that because it believed that KRCA was a distant signal for copyright purposes, "Falcon did not substantiate its claim of inadequate signal quality for those systems at that time . . . ." Falcon now submits copies of letters it sent to KRCA on July 28, 1994, summarizing signal quality tests performed by Falcon showing KRCA's signal strength to be -69dBm at Falcon's Thousand Oaks headend and -78dBm at Falcon's Malibu headend. Accordingly, claims Falcon, it need not carry KRCA.

4. In reply, KRCA states that had Falcon timely informed the station that the Agoura Hills system was carrying its full complement of must-carry signals, KRCA would not have had to file a complaint with respect to that system. KRCA urges the Commission to impose sanctions upon Falcon for its violations of §76.61(a)(2) of the Commission's Rules[5] and concomitant frustration of the dispute resolution process promoted by the rule. KRCA notes that inadequate signal strength is not a bar to carriage if, as KRCA has done, the station agrees to be responsible for the costs of delivering an adequate signal, citing §614(h)(1)(B)(iii) of the Communications Act[6] and §76.55(c)(3) of the Commission's Rules.[7] KRCA submits test results of its own that demonstrate it provides a signal strength of -31dBm at Falcon's Thousand Oaks headend, and a signal strength of -31dBm (horizontal polarization) and -35dBm (vertical polarization) at Falcon's Malibu

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[1] In addition, KRCA notes that it would not be entitled to carriage were it to be considered a distant signal pursuant to §111(f) of the Copyright Act, 17 U.S.C. §111(f), and did not agree to indemnify Falcon for any increased liability resulting from the station's carriage. While the Commission originally designated the market in question as Los Angeles-San Bernardino-Corona-Fontana, California, in 1972, *Cable Television Report and Order*, 36 FCC 2d 143, 220 app. A (1972), the Commission has redesignated the market as Los Angeles-San Bernardino-Corona-Fontana-Riverside. *Report and Order in MM Docket No. 93-207*, 8 FCC Rcd 8472 (1993). Accordingly, Falcon's objections to carriage of KRCA on grounds of increased copyright liability are moot.

[2] 47 U.S.C. §534(h)(1)(B)(iii). *See also* 47 C.F.R. 76.55(c)(3).

[3] 47 U.S.C. §534(b)(1)(B).

[4] 47 C.F.R. §76.56(b)(2).

[5] 47 C.F.R. §76.61(a)(2). In addition, KRCA states that the only information provided by Falcon concerning its Agoura Hills system's channel complement listed just 10 commercial must-carry stations carried in June 1993. KRCA states that Falcon never responded to the station's letter of May 13, 1994, despite the requirement of §76.61(a)(2) of the Rules that a system respond to a request for carriage within 30 days. KRCA further notes that in the *Clarification Order in MM Docket No. 92-259*, *supra*, the Commission stated that notices that a station does not deliver an adequate signal should reflect measurements already made, and that cable operators should respond to requests for measurement information regarding signal quality disputes within 3 business days of the request. In the present case, Falcon admits it did not substantiate its allegations of poor signal quality from KRCA until July 28, 1994, despite KRCA's request for substantiation dated March 18, 1994.

[6] 47 U.S.C. §534(h)(1)(B)(iii).

[7] 47 C.F.R. §76.55(c)(3).

headend.[8] Accordingly, contends KRCA, Falcon's obligation to carry KRCA's signal in Thousand Oaks and Malibu is clear.

DISCUSSION

5. With respect to Falcon's Agoura Hills system, clearly Falcon is not required to carry more than its mandated complement of must-carry signals. As Falcon's Agoura Hills system contains 36 activated channels, the Communications Act and our rules only require Falcon to carry the signals of 12 local commercial television stations, which KRCA concedes that Falcon currently does. Accordingly, KRCA's complaint must fail with respect to this system.[9]

6. Turning to KRCA's complaint concerning Falcon's Thousand Oaks and Malibu systems, we note that, according to §614(h) of the Communications Act of 1934, in order to qualify for must-carry rights, a UHF station such as KRCA must deliver to a cable system's principal headend a signal level of -45dBm. Since the cable operator is in the best position to know whether or not a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.[10]

7. In applying the above standard, we have determined that good engineering practices require that for UHF stations such as KRCA, if the initial test results show a signal level of less than -51dBm, then at least four readings must be taken over a two-hour period. If the initial readings show a signal level between -51dBm and -45dBm, inclusive, then six readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results. *See Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 8 FCC Rcd 4953 (1993). In this instance, however, Falcon fails to submit any specific information concerning any of the number of readings taken---including the number of readings taken, time of day, and weather conditions---nor specific equipment model numbers or full descriptions of equipment characteristics. Accordingly, Falcon's summary engineering data submissions are insufficient to demonstrate, consistent with Commission requirements, that KRCA's signal strength is generally below the level of -45dBm required for UHF stations. *See Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable, supra*.[11]

8. In view of the foregoing, we find that grant of KRCA's petition CSR-4272-M with respect solely to Thousand Oaks, California is in the public interest, and also that grant of KRCA's petition CSR-4273-M is in the public interest.

ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, That the complaints filed June 17, 1994, by Fouce Amusement Enterprises, Inc. ARE GRANTED to the extent indicated at paragraph 8, *supra*, in accordance with §614(d)(3) of the Communications Act of 1934, as amended [47 U.S.C. §534(d)(3)], and in all other respects ARE DENIED.

10. IT IS FURTHER ORDERED, That Falcon Cable TV SHALL COMMENCE CARRIAGE of the signal of KRCA forty-five (45) days from the release date of this *Order* on Falcon Cable TV's systems serving Thousand Oaks and Malibu, California. This *Order* shall take effect unless Falcon Cable TV submits, within fifteen (15) days of the release date of this order, engineering data which demonstrates KRCA's poor signal quality at Falcon Cable TV's principal headends serving Thousand Oaks, California, and Malibu, California.

11. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[8] In addition, states KRCA, Falcon's July 28, 1994 letter misstates the location of Falcon's Thousand Oaks headend.

[9] We note, however, KRCA's allegations of consistent behavior by Falcon that manifests a strong disregard of our rules, including Falcon's giving KRCA the impression that Falcon's Agoura Hills system did not carry its full complement of must-carry signals, as well as Falcon's failure to respond to legitimate requests from KRCA in a timely fashion. Behavior such as this frustrates informal dispute resolution and does not promote the efficient use of time and resources of this Commission and the entities it regulates.

[10] At a minimum, signal strength surveys should include the following information, in addition to that noted above: (1) the specific make and model numbers of the equipment used; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether or not the antenna was properly oriented; (4) the weather conditions and time of day when the tests were done.

[11] We note, too, in any event, that KRCA has offered to cover the costs of any equipment needed to provide a signal of adequate strength to Falcon's principal headends. *See* paragraph 2, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications of

JOSEPH BAHR	File No. BPH-871028MB
GUILLERMO A. BONET	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION	File No. BPH-871029MK

For Construction Permit for a
New FM Station on Channel 291A,
Hormigueros, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: December 29, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it for consideration a Joint Request for Approval of Settlement Agreement filed September 28, 1994 by Joseph Bahr, Guillermo A. Bonet, and Renacer Broadcasters Corporation (Joint Applicants); an Amendment to Joint Request filed November 4, 1994 by the Joint Applicants; Mass Media Bureau Comments in Support filed November 14, 1994; and a Second Amendment to Joint Request filed December 9, 1994 by the Joint Applicants.

2. In this proceeding, the presiding administrative law judge awarded the construction permit for a new Hormigueros FM broadcast station to Renacer and denied the competing applications of Bahr, Bonet, and a third applicant whose application was subsequently dismissed for failure to prosecute. *Initial Decision*, 6 FCC Rcd 4488 (1991). The Board remanded for further hearing to determine whether Renacer was lacking in candor or made misrepresentations with respect to a principal's claim to own property and the effect thereof on the applicant's basic qualifications to be a Commission licensee. *Memorandum Opinion and Order*, 7 FCC Rcd 2147 (1992). After hearing further evidence, Administrative Law Judge Edward Luton determined, "|I|t cannot be concluded that |Renacer's principal| misrepresented or lacked candor in any meaningful sense in claiming to own' the properties in question." *Supplemental Initial Decision*, 8 FCC Rcd 4771 (1993). Bahr and Bonet each filed exceptions, and together filed a Joint Petition to Enlarge Issues and Reopen Record. Renacer replied to the exceptions; it opposed the Joint Petition, and Bahr and Bonet replied. Renacer also filed exceptions on a procedural point, to which Bonet replied. These matters have continued in pending status pursuant to Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), and Public Notice, Modification of FCC Comparative Proceedings Freeze Policy, FCC 94-204 (Aug. 4, 1994), issued in light of *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (integration criteria applied to mutually exclusive broadcast applicants are arbitrary and capricious and unlawful).

3. The settlement agreement contemplates selection of the permittee by lottery, with each applicant having an equal opportunity for selection. The applicants not selected will dismiss their applications. The Joint Applicants initially asked the Board to request the assistance of the Commission's Acting Secretary in holding the lottery. However, they modified their agreement and amended their request for approval to provide for the assistance of a member of the Federal Communications Bar Association. The Mass Media Bureau interposed no objection to this means of selection, stating that all of the applicants had been found fully qualified to become Commission licensees and the declarations required by 47 C.F.R. § 73.3525 had been provided. The applicants filed their second amendment to state that Renacer was selected as the winner in the lottery held on November 14, 1994 in the presence of Administrative Law Judge John M. Frysiak, who had served as settlement judge. The applicants jointly request that the applications of Bahr and Bonet be dismissed and the application of Renacer granted.

4. We will grant the request before us because it complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525(a) which govern settlement agreements. Thus, the dismissing applicants have stated under penalty of perjury that there is no consideration for the dismissal of their applications, that they did not file their applications for the purpose of entering into a settlement agreement, that this agreement constitutes the entire understanding and agreement between the parties, and that approval of the agreement will serve the public interest by hastening the inauguration of a new broadcast service to Hormigueros, Puerto Rico. In reaching this determination, we have also considered the exceptions going to Renacer's basic character qualifications and the Joint Petition to Enlarge Issues and Reopen Record seeking addition of character and real-party-in-interest issues against Renacer; we conclude that there is no basis for overturning the ALJ's finding that Renacer is qualified or for ordering further hearing on Renacer's qualifications.

5. The Board designated the misrepresentation/lack of candor issue against Renacer because, during deposition questioning about the basis for Renacer's financial qualifications, Renacer principal Larry Ramos had claimed ownership in properties used to secure Renacer's bank financing. In light of the lack of any public record of Ramos' ownership of these properties and of ambiguous statements from others with an interest in the same properties, the Board found a substantial and material question about just what ownership interests Larry Ramos had and, therefore, about Ramos' truthfulness regarding his property interests. 7 FCC Rcd 2147. Although Puerto Rican property law was never clearly understood in this proceeding, based on the undisputed testimony of Victor Sotomayor Clavell, a Puerto Rican attorney whose expertise in this area was unchallenged, the ALJ found that Ramos held legally enforceable rights to the properties in question, which empowered him to encumber them. 8 FCC Rcd at 4775 ¶ 29. The ALJ found no basis for concluding that Ramos misrepresented or lacked candor about his ownership interest in any meaningful sense. He did not explicitly

address Ramos' intent or motive. In exceptions, Bonet concedes that Ramos had the right to encumber the properties in question as security for Renacer's bank financing, Bonet Brief at 2, and Bahr concedes that the record testimony shows that Ramos had an ownership interest in the properties under Puerto Rican law. Bahr Brief at 3-4. They both argue, nonetheless, that Ramos was not fully forthcoming about the interests held in the same properties by family members, especially Ramos' father, and the fact that Ramos' interest was limited to using the properties as security. This they argued was intentional misrepresentation or lack of candor intended to avoid a comparative demerit under the now partially discredited *Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393 (1965),[}}Z [1] that might follow from disclosure of the interest of Ramos' father, who is also a broadcaster in the same area (Bonet Brief at 7), or to avoid a real-party-in-interest issue involving Ramos' father (Bahr Brief at 9-10).

6. A critical element for a finding of disqualifying misrepresentation or lack of candor is an intent to deceive the Commission. *Fox River Broadcasting, Inc.* 93 FCC 2d 127, 129 (1983). Intent can be found from motive, but more than the speculation and innuendo in Bonet's and Bahr's exceptions is needed. The ALJ made no adverse findings about Ramos' or Renacer's motives, and neither Bonet nor Bahr has pointed to anything in the record other than the fact that Ramos' family members also have interests in the properties upon which Renacer relies for bank financing, which would support the allegations. "[T]he Commission recognizes that even independent family relationships may have attributes such as financial ties which in a non-family relationship would be persuasive indicia of real party status." *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 ¶ 24 (Rev. Bd. 1983).

7. Bonet and Bahr support the suspicions expressed in the Joint Petition to Enlarge Issues and Reopen Record with hearsay from Bonet's son-in-law that someone with no alleged or apparent reason to have knowledge of the Renacer application had referred him to Ramos' father when he called for information about a Renacer director who had died. This falls far short of the specific allegations of fact required for a prima facie showing of disqualifying misconduct that would require further hearing. Furthermore, Ramos' father's denial under penalty of perjury of any attempt, directly or directly, or any intention to influence, manage or control any aspect of Renacer's application, corporation or station was not contradicted by any factual offering. *See* Declaration of Castolino Ramos, Opposition to Joint Petition, Exh. A. *See also Astroline Communications v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Bonet and Bahr also allege a violation of the reporting requirement in 47 C.F.R. § 1.65, arguing without any factual support whatsoever that Renacer delayed reporting the death of a Renacer director to discourage the filing of exceptions by Bonet and Bahr. The report was filed within thirty days after Renacer learned of her death and, therefore, is within the period prescribed in 47 C.F.R. § 1.65. Although Bonet and Bahr argue that Renacer should have learned of her death sooner, Renacer's explanation that its principals had no need to talk with her during the hiatus between the remand hearing and the *Supplemental Initial Decision* is plausible and unrebutted. The alleged connection between a report of the death and the filing of exceptions on which Bonet and Bahr rely in seeking further review is tenuous at best. There is no prima facie showing of deceitful intent in Renacer's conduct concerning the reporting of the death and, therefore, no need for further inquiry. *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1259 (D.C. Cir. 1991); *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1588 (1992).

8. In conclusion, after reviewing the *Supplemental Initial Decision* and the transcript of Ramos' claim to property ownership, which shows that inquiry into shared interests was cut off by objections of counsel before Ramos could elaborate on his answer, dep. tr. 67-69, Renacer Consolidated Reply Brief, App. 1, and considering both the translation difficulties reflected in that transcript, dep. tr. 68, and the anomalies of property law in Puerto Rico, we conclude that nothing raised in the Bonet or Bahr exceptions requires reversal of the ALJ's determination in favor of Renacer or requires further exploration before we can act on the settlement agreement. We also conclude that nothing raised in the Joint Petition requires inquiry before we can act on the settlement agreement. The parties to the settlement have satisfied the statutory and regulatory requirements for approval of the settlement, and termination of this proceeding so that new broadcast service can be brought to the public is in the public interest.

9. ACCORDINGLY, IT IS ORDERED That the Joint Request for Approval of Settlement Agreement filed September 27, 1994, as amended November 4, 1994 and December 9, 1994, by Joseph Bahr, Guillermo A. Bonet, and Renacer Broadcasters Corporation IS GRANTED and the attached Agreement IS APPROVED; that the Petition for Leave to Amend filed August 18, 1993 and supplemented August 23, 1994 by Renacer Broadcasters Corporation IS GRANTED and the Joint Opposition to Petition for Leave to Amend filed by Joseph Bahr and Guillermo A. Bonet IS DENIED; that the Exceptions and Supporting Brief of Joseph Bahr Relative to Supplemental Initial Decision filed August 11, 1993, Exceptions and Brief to Supplemental Initial Decision of Guillermo A. Bonet filed August 20, 1993, and Renacer Broadcasters Corporation's Consolidated Brief and Exceptions to Supplemental Initial Decision of Administrative Law Judge Edward Luton filed August 20, 1993 ARE DENIED; and that the Joint Petition to Enlarge Issues and Reopen Record filed September 1, 1993 by Joseph Bahr and Guillermo A. Bonet IS DENIED.

10. IT IS FURTHER ORDERED That the applications of Joseph Bahr (File No. BPH-871028MB) and Guillermo A. Bonet (File No. BPH-871029MH) ARE DISMISSED; that the application of Renacer Broadcasters Corporation (File No. BPH-871029MK), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INC.

Application for authority to acquire and operate cable facilities for service between the United States and various overseas points. File No. I-T-C-94-483

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 12, 1994; Released: December 29, 1994

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-483 IS GRANTED, and Graphnet, Inc. (Graphnet) is authorized to:

a. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate circuits in the PTAT-1, TAT-9, TAT-10, TAT-11, TAT-12/13, Germany-Denmark-1, MAT-2, EMOS-1, NPC-1, TPC-4, TPC-5, HAW-4, HAW-5, and HJK cable systems, as specified in the Appendix hereto;

b. lease and operate necessary connecting facilities in the United States;

c. lease a one-half interest in and operate any necessary overseas connecting facilities; and

d. use said facilities to provide authorized communications services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that our authorization of Graphnet to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and any one of the points authorized herein -- that is, private lines which originate in the United States and terminate in one of the points authorized or which originate in any of the points authorized and terminate in the United States. In addition, Graphnet may not -- and Graphnet's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Graphnet nor any persons or companies directly or indirectly controlling or controlled by Graphnet, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Graphnet or any persons or companies controlling or controlled by Graphnet are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any order for the PTAT-1 or NPC cable, issued under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service via the PTAT-1 or NPC cable system.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b) for all common carrier facilities authorized herein.

11. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

Destination	Cable System	No. of circuits
United Kingdom	PTAT-1	4 E-1s
	TAT-11	14 DS-1s
	TAT-12/13	14 DS-1s
France	TAT-9	1 DS-3
	TAT-11	14 DS-1s
	TAT-12/13	14 DS-1s
Germany	TAT-10	1 DS-3
Denmark	TAT-10	3 DS-1s
	Germany-Denmark-1	3 DS-1s
Finland	TAT-10	3 DS-1s
	Germany-Denmark-1	3 DS-1s
Norway	TAT-10	3 DS-1s
	Germany-Denmark-1	3 DS-1s
Sweden	TAT-10	3 DS-1s
	Germany-Denmark-1	3 DS-1s
Spain	TAT-9	22 DS-1s
Portugal	TAT-9	6 DS-1s
Ireland	PTAT-1	1 E-1
Italy	TAT-9	2 E-1s
	MAT-2	2 E-1s
	TAT-11	16 DS-1s
Greece	TAT-9	12 64-kbps
	MAT-2	12 64-kbps
	EMOS-1	12 64-kbps
Turkey	TAT-9	6 64-kbps
	MAT-2	6 64-kbps
	EMOS-1	6 64-kbps
Israel	TAT-9	12 64-kbps
	MAT-2	12 64-kbps
	EMOS-1	12 64-kbps
Netherlands	TAT-10	16 DS-1s
Austria	TAT-10	7 DS-1s
Bulgaria	TAT-10	2 DS-1s
Czech Republic	TAT-10	2 DS-1s
Hungary	TAT-10	2 DS-1s
Poland	TAT-10	2 DS-1s
Romania	TAT-10	2 DS-1s
Russia	TAT-10	11 DS-1s
Belgium	TAT-11	6 DS-1s
Switzerland	TAT-11	6 DS-1s
Japan	NPC-1	3 E-1s
	TPC-4	1 DS-3
	TPC-5	1 DS-3
Hong Kong	NPC-1	1 E-1
	HJK-1	1 E-1
South Korea	NPC-1	1 E-1
	HJK-1	1 E-1
Hawaii	HAW-4	1 DS-3
	HAW-5	1 DS-3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CYBERLINK, INC.

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

File No. I-T-C-94-513

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 12, 1994; Released: December 29, 1994

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-94-513 IS GRANTED, and Cyberlink, Inc. is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1 PAS-2, and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix D;

f. lease and operate necessary connecting facilities in the United States;

g. lease a one-half interest in and operate any necessary overseas connecting facilities; and

h. use the facilities authorized in b, c, and d, above to provide Cyberlink's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A, B, and C.

3. IT IS FURTHER ORDERED that neither Cyberlink nor any persons or companies directly or indirectly controlling or controlled by Cyberlink, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Cyberlink or any persons or companies controlling or controlled by Cyberlink are parties.

4. IT IS FURTHER ORDERED that our authorization of Cyberlink to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, Cyberlink may not -- and Cyberlink's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41 or TDRS-174 satellites.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT
(CIRCUITS ARE 64 KBPS)

COUNTRY	NUMBER[1]	COUNTRY	NUMBER	COUNTRY	NUMBER
Argentina	50	Ireland	50	Spain	50
Australia	50	Israel	50	Sweden	50
Austria	50	Italy	50	Switzerland	50
Bahamas	50	Jamaica	50	Syria	50
Barbados	50	Japan	50	Taiwan	50
Belgium	50	Jordan	50	Thailand	50
Bolivia	50	Kenya	50	Trinidad & Tobago	50
Brazil	50	Korea, Republic of	50	Uganda	50
Canada	50	Kuwait	50	United Arab Emirates	50
Czech Republic	50	Lebanon	50	United Kingdom	50
Chile	50	Liechtenstein	50	Uruguay	50
China, People's Republic	50	Luxembourg	50	Vietnam	50
Denmark	50	Malaysia	50	Venezuela	50
Dominican Republic	50	Mexico	50	Yugoslavia	50
Ecuador	50	Morocco	50	Zaire	50
Egypt	50	Netherlands	50		
El Salvador	50	Netherlands Antilles	50		
Ethiopia	50	New Zealand	50		
Finland	50	Nicaragua	50		
France	50	Norway	50		
Germany	50	Panama	50		
Ghana	50	Peru	50		
Greece	50	Philippines	50		
Guatemala	50	Poland	50		
Haiti	50	Portugal	50		
India	50	Romania	50		
Indonesia	50	Saudi Arabia	50		
Iran	50	Senegal	50		
		Singapore	50		
		Somalia	50		
		South Africa	50		

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1
(NON-INTERCONNECTED)

Up to 10 64-Kbps voice grade circuits between the United States and the following countries:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzogovenia
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Somalia
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
Yugoslavia

C-band Countries

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to 6 64-Kbps voice grade circuits between United States and the countries listed below:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzogovenia
Czech Republic
Portugal
Romania
Russian Fed.
Somalia
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED

Up to ten 64-kbps voice-grade circuits between the United States and the countries listed below:

Bosnia-Herzegovenia
Somalia
United Kingdom

COUNTRIES TO BE SERVED PAS-2 (INTERCONNECTED)

Up to six 64-kbps voice-grade circuits to each ot the following points:

Bosnia-Herzegovenia
Somalia
United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-kbps voice-grade circuits to each of the following countries:

Australia
Hong Kong
New Zealand
Taiwan

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-kbps voice-grade circuits to each of the following countries:

Australia
Hong Kong
New Zealand
Taiwan

APPENDIX C

COUNTRIES TO BE SERVED VIA TDRS SATELLITES
(NON-INTERCONNECTED)

Up to 10 64-Kbps circuits between the United States and the countries listed below:

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzogovenia	Philippines
Canada	Republic of Korea
Denmark	Taiwan
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Somalia	
Sweden	
Switzerland	
Turkey	
United Kingdom	

COUNTRIES TO BE SERVED VIA TDRS SATELLITES
(INTERCONNECTED)

Up to 6 64-kbps circuits between the United States and the countries listed below:

TDRS-41	TDRS-174
Germany	Hong Kong
Bosnia-Herzogovenia	Taiwan
Somalia	
United Kingdom	

APPENDIX D

COUNTRIES TO BE SERVED VIA AUTHORIZED
U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD
SATELLITES AND ANIK SATELLITES

Anguilla	U.S. DomSats
Antigua and Barbuda	U.S. DomSats
Bahamas	U.S. DomSats
Barbados	U.S. DomSats
Belize	U.S. DomSats
Bermuda	U.S. DomSats
British Virgin Islands	U.S. DomSats
Canada	U.S. DomSats, Anik
Cayman Islands	U.S. DomSats
Dominica	U.S. DomSats
Grenada	U.S. DomSats
Grenadines	U.S. DomSats
Mexico	U.S. DomSats, Mexican DomSats
Montserrat	U.S. DomSats
Netherlands Antilles	U.S. DomSats
St. Kitts-Nevis	U.S. DomSats
St. Lucia	U.S. DomSats
St. Vincent	U.S. DomSats
Turks & Caicos	U.S. DomSats
Venezuela	U.S. DomSats

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

T-ONE COMMUNICATIONS, INC.

Application for authority to acquire and operate facilities in the PTAT-1 Cable System for provision of service between the United States and various overseas points.

File No. I-T-C-94-493

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 14, 1994; Released: December 29, 1994

By the Chief, Telecommunications Division:

1. The above-captioned uncontested application, filed by T-One Communications, Inc. (T-One) requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of communications services between the United States and various overseas points. The application was placed on public notice on September 28, 1994. No comments were received.

2. T-One, a corporation organized under the laws of the State of Delaware, is a nondominant facilities based carrier. T-One proposes to acquire on an Indefeasible Right of User (IRU) basis, three E-1 half-circuits in PTAT-1, for the provision of authorized international communications services between the United States and the countries specified in the Appendix hereto.

3. The Commission stated in its Private Submarine Cable Decision[1] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[2] In this context, we find that T-One application contains all of the information necessary under Section 63.01 of the Commission's Rules.[3] Furthermore, we find that T-One application does not raise any economic impact issues.[4]

4. Upon consideration of the application, we find that authorization of the facilities requested will serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-94-493 IS GRANTED, and T-One is authorized to:

a. acquire on an IRU basis a one-half interest in and operate three E-1 circuits in the PTAT-1 Cable System between the United States and the United Kingdom and Ireland;

b. lease and operate necessary domestic connecting facilities;

c. lease a one-half interest in and operate necessary overseas connecting facilities; and

d. use said facilities for the provision of T-One's authorized services, including switched voice and data, and private line services, between the United States and the countries listed in the Appendix hereto.

6. IT IS FURTHER ORDERED that our authorization of T-One to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendix -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix or which originate in one of the countries listed in the Appendix and terminate in the United States. In addition, T-One may not -- and T-One's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

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[1] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[2] This requirement was restated in the *International* decision in which the Commission determined that it would require nondominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985) (*"International"*). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

[3] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*"Pacific Telecom"*).

[4] In its *Pacific Telecom* decision, the Commission stated that it has authority under its public interest mandate under Section 214 to consider sua sponte any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

7. IT IS FURTHER ORDERED that neither T-One nor any persons or companies directly or indirectly controlling or controlled by T-One, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which T-One or any persons or companies controlling or controlled by T-One are parties.

8. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any order for the PTAT-1 Cable System, issued under the act entitiled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

12. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service over the PTAT-1 Cable System.

13. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

COUNTRY	NO. OF VOICE EQUIVALENT CIRCUITS
Austria	2
Belgium	2
Czech Republic	2
Denmark	2
Finland	10
France	5
Germany	5
Greece	2
Hungary	2
Iceland	2
Ireland	2
Italy	10
Luxembourg	2
Monaco	10
Netherlands	2
Norway	2
Poland	2
Portugal	2
Slovakia	2
Spain	2
Sweden	2
Switzerland	5
Turkey	2
United Kingdom	10

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 1.49
of the Commission's Rules

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ORDER

Adopted: December 16, 1994; Released: December 29, 1994

By the Commission:

1. In this *Order*, we deny a petition for reconsideration of our prior *Memorandum Opinion and Order* in this proceeding, 9 FCC Rcd 3415 (1994), which amended Section 1.49(a) of the Rules, 47 C.F.R. § 1.49(a), *inter alia*, to require that Commission filings must utilize a type of at least 12-point in height and must be double spaced with margins set so that the printed material does not exceed 6 1/2 x 9 1/2 inches (16.5 cm. x 24.1 cm.).[1]

2. The petition for reconsideration asserts that the 12-point type requirement would preclude the use of a standard typewriter for the submission of pleadings; that many computer word processing programs do not provide for the control of the height of the typeface used; that a 16-point typeface had to be utilized on the instant pleading to comply with the rule, which results in an inappropriate number of pages of paper; and that there should only be a restriction on the maximum size of the printed area, as approximately centered, rather than on the size of the borders around the area of printed material.

3. We find no merit in petitioner's contentions. The revision of Section 1.49 in question was intended to ensure that one party does not gain an unfair advantage over another, while at the same time minimizing the burden on all making filings with the Commission. Our observation of filings since that action was taken is that, notwithstanding petitioner's claims, the effort was successful. Filings regularly comply with the provisions of the rule without any unusual circumstances. Moreover, there has been no response to this petition for reconsideration indicating any support for petitioner's contentions. Finally, a standard typewriter with pica type, which is defined as 12 point type and six lines to the vertical inch, *Merriam Webster's Collegiate Dictionary*, 10th Ed., could be used for the submission of filings in accordance with the rule. Under these circumstances, it appears that no showing has been made warranting the relief requested.

4. ACCORDINGLY, IT IS ORDERED That the petition for reconsideration filed August 10, 1994 by David B. Popkin IS DENIED.

[1] David B. Popkin filed a Petition for Reconsideration on August 10, 1994. A Public Notice listing this pleading was issued on September 15, 1994. No filing in response to this pleading has been received.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Citizens Utilities Company — AAD 94-37
GTE Northwest Incorporated
GTE California Incorporated

Joint Petition for Waiver
of the Definition of "Study Area"
in the Appendix-Glossary of Part 36
of the Commission's Rules

and

Citizens Utilities Company

Petition for Waiver of Section 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 6, 1994

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On April 1, 1994, Citizens Utilities Company ("Citizens"), GTE Northwest, and GTE California (collectively, "Petitioners"), filed a joint petition for waiver ("Joint Petition") of the definition of "Study Area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. The requested study area waiver petition includes the following proposals: (1) GTE Northwest would be allowed to change its Oregon study area to reflect its merger with another GTE-owned carrier in Oregon and the sale of five Oregon exchanges to Citizens; (2) Citizens would be allowed to change its study area in Oregon to reflect the purchase of the five Oregon exchanges from GTE Northwest; (3) GTE California would be allowed to change its study area to reflect the sale of five California exchanges to Citizens; and (4) Citizens would be allowed to change its California study area to reflect its purchase of the five California exchanges from GTE California. Citizens also seeks a waiver of the Commission's price cap rules contained in Section 61.41(c) to exempt it from the price cap all-or-nothing rule.[1]

2. On April 22, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the petition for waiver.[2] The United States Telephone Association filed comments in support of the requested waiver, and no party opposes the transactions. GTE Service Corporation ("GTE"), the parent company of GTE Northwest, GTE California, and Contel of the Northwest,[3] submitted additional financial data for the study area waiver requests.[4] On September 29, 1994, GTE submitted a letter requesting that the portion of the Joint Petition related to the sale of the Oregon exchanges to Citizens be dismissed without prejudice because GTE Northwest and Citizens were renegotiating the Oregon sale to include additional properties. With that letter GTE also submitted a copy of an Order of the Public Utilities Commission of California ("California Commission") approving the sale of five California telephone exchanges to Citizens and a copy of an Order of the Public Utility Commission of Oregon ("Oregon Commission") approving the merger between the two GTE carriers operating in Oregon (*i.e.*, GTE Northwest and Contel of the Northwest).[5] In this Order, we find that allowing GTE to merge its GTE Northwest and Contel study areas in Oregon, and allowing GTE California to transfer five California exchanges to Citizens, while adjusting the study area boundaries of Citizens and GTE California to reflect that transfer, will serve the public interest. Accordingly, we grant the Joint Petition as explained, and conditioned, below.[6]

II. BACKGROUND

3. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[7] For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[8]

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[1] Section 61.41(c) of the Commission's rules (the "all-or-nothing" rule) provides that when a carrier that is not subject to the price cap rules (a "non-price cap company") acquires a price cap company, or any part thereof, the acquiring company shall become subject to price cap regulations. *See* 47 C.F.R. § 61.41(c).

[2] Public Notice, 9 FCC Rcd 1873 (Com. Car. Bur. 1994).

[3] The Contel operating telephone companies became subsidiaries of GTE when Contel Corporation was merged with GTE on March 14, 1991. See 6 FCC Rcd 1003 (1991).

[4] Letter from, Edwin Shimizu, GTE Service Corporation, to Kent Nilsson, FCC, dated April 1, 1994 ("April 1 Supplement"). *Ex parte* letter from Edwin Shimizu, GTE Service Corporation, to William Caton, Acting Secretary, FCC, dated November 23, 1994 ("Nov. 23 Supplement").

[5] *Ex parte* letter from Edwin Shimizu, GTE Service Corporation, to William Caton, Acting Secretary, FCC, dated Oct. 17, 1994. (Order was forwarded to the FCC on Sept. 29, 1994; Public Utilities Commission of California Order 94-09-080 (Sept. 15, 1994) ("California Commission Order") and Public Utility Commission of Oregon Order No. 94-336 (Feb. 22, 1994) ("Oregon Commission Order").

[6] As requested, GTE's associated request for a waiver of the frozen study area boundaries related to the transfer of five Oregon exchanges is dismissed without prejudice.

[7] The phrase "jurisdictional separations," or "separations" refers to the process of dividing costs, revenues, and expenses between an exchange carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1 - 36.741.

[8] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (Joint Board Recommended Decision), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation*). *See also* Amendment of Part 36 of

Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[9] The Commission has three primary concerns in evaluating petitions seeking such a waiver: first, that the change does not affect adversely the Universal Service Fund ("USF") support program;[10] second, that the state commission(s) having regulatory authority do not object to the change;[11] and finally, that the public interest supports grant of the waiver. Any party requesting a waiver of a rule must show good cause why that waiver should be granted, and must persuade the Commission that the requested relief will not undermine the interests served by the rule.[12]

III. STUDY AREA WAIVER

4. GTE owns two local exchange carriers ("LECs") in Oregon, GTE Northwest and Contel of the Northwest, which are operated as separate study areas. GTE Northwest serves approximately 334,000 access lines in 45 Oregon exchanges. Contel of the Northwest serves approximately 28,000 access lines in 13 Oregon exchanges. GTE Northwest seeks a waiver to consolidate the Contel study area into its existing Oregon study area. GTE Northwest would be the surviving company and study area.

5. GTE California serves approximately 3.5 million access lines in 287 exchanges. Citizens serves approximately 79,000 access lines in 29 California exchanges. It proposes to purchase five exchanges with approximately 5200 access lines from GTE California. GTE California seeks a waiver to remove five exchanges from its California study area.[13] Citizens, the purchasing carrier, seeks a waiver to add these five exchanges to its existing California study area. Petitioners argue that the pending acquisition is an arm's length transaction between unaffiliated entities; and, since there is no pre-existing relationship between Citizens and GTE California, there is no opportunity for either party to "game" the system. Petitioners argue that grant of the waiver would serve the public interest. Citizens states that its has demonstrated a track record of providing high quality, technically advanced telecommunications service in the rural and suburban markets that it serves.

6. Petitioners estimate that grant of the study area waivers would result in a net reduction in their draw from the USF.[14] Petitioners state that in Oregon, the requested study area change would reduce GTE's draw on the USF by $2,148,945 annually; and for California, the requested study area changes would increase its draw on the USF by $720,273 annually.[15] GTE Northwest currently does not receive USF support in Oregon because its study area cost per loop ($232) is below the established national eligibility threshold for USF support.[16] Contel of the Northwest currently receives $2,148,945 annually in USF support.[17] Petitioners estimate that, after consolidation of the two Oregon study areas, GTE Northwest will not be eligible for USF support because its average cost per loop will be below the eligibility threshold. GTE California currently receives $3,419,581 in annual USF support. GTE estimates that, after the proposed sale of the five exchanges to Citizens, it would receive $3,300,058 in annual USF support, a reduction of $119,523. Citizens estimates that, after the proposed transfer and upgrading of the five California exchanges, it's annual USF support would increase to $14,171,898 from its 1994 USF draw of $13,332,102, an increase of $839,796.

7. Petitioners contend that the benefits of the proposed transfer of assets are substantial.[18] GTE also states that this transaction is part of its strategic effort to trade or sell a small percentage of its local exchange properties that may be of greater long-term strategic value to other telephone service providers, and to obtain local exchange properties that will permit the clustering of local exchanges for greater operating efficiencies.

8. Citizens states that its business strategy is to acquire and operate LECs in small and medium-sized cities and towns that are experiencing above-average economic growth.[19] It also states that it is committed to providing service through state-of-the-art technology. Citizens further states that it intends to deploy digital switching and fiber technology gradually throughout its network.[20] In addition,

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the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 59741 (1990) (*Study Area Notice*).

[9] 47 C.F.R. Part 36, Appendix-Glossary. *See also* 47 C.F.R. § 1.3.

[10] *See Joint Board Recommended Decision*, 49 Fed. Reg. 48337, para. 65. The Commission created the USF in order to preserve and promote universal telephone service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows local exchange carriers with high local loop costs to allocate a portion of those costs to the interstate jurisdiction, thus allowing the states to establish lower local exchange rates in those service areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. § 36.631.

[11] *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976 (1990) ("*Study Area Notice*"). In that notice the Commission described the factors that led to the present restriction on study area changes and tentatively concluded that future modifications to study area boundaries may be approved if the state jurisdiction does not oppose the change.

[12] 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The three-part test for a study area waiver is part of the standard for determining whether the good cause showing required for all waivers has been made by a petitioner seeking waiver of our study area rules.

[13] GTE states that it will adjust its price cap indices to reflect the sale of these exchanges effective July 1, 1995. *Ex parte* letter from Edwin Shimizu, GTE Service corporation, to William Caton, Acting Secretary, FCC, dated Nov. 23, 1994 ("GTE Nov. 23 Letter").

[14] See April 1 Supplement and Nov. 23 Supplement.

[15] Joint Petition at 5.

[16] USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average cost per loop in order to qualify for USF support. The national average cost per loop is currently $239, so the threshold for USF support is $275 (*i.e.*, (the national average cost per loop - -$239) x (115% or 1.15) = $275 -- the USF eligibility support threshold). *See* 47 C.F.R. § 36.631, National Exchange Carrier Association, Inc. 1993 USF Report Section 1, p.3.

[17] Joint Petition at Attachment I.

[18] Joint Petition at 4.

[19] *Id.*

[20] April 1 Supplement at Section 2.

Citizens states that it will provide equal access[21] and other advanced services as customer interests and the needs of the business dictate. Citizens states that it will begin operation of the California properties acquired from GTE California by adopting the existing capital improvement plans of GTE California. However, recognizing the two companies may have different planning objectives, Citizens states that it intends to perform an immediate, and thorough, review of the capital budgets for this area and will initiate all changes that are necessary to bring the properties into compliance with Commission, customer, and company expectations.[22]

IV. DISCUSSION

USF Impact

9. The Commission froze all LEC study area boundaries as they existed on November 15, 1984, in part, to ensure that LECs do not set up high cost exchanges within their existing service territories as separate study areas to maximize high cost support.[23]

10. The Petitioners have provided estimates of the impact of the requested study area waivers upon the USF. GTE estimates that the combination of its Oregon study areas will reduce its annual USF draw by $2,148,945. It estimates that removal of the five California exchanges it intends to sell to Citizens will reduce its annual USF draw by $119,523. Citizens estimates that inclusion of these exchanges in its California study area will increase its annual USF draw by $839,796. Thus, Petitioners estimate that the net effect if these study area waivers would be a net reduction in their combined annual USF draws of $1,428,672.

11. As we have stated previously, we are concerned about the possibility that this sale and a number of proposed transactions could, in the aggregate, have a substantial effect on the size of the USF. In one respect, this concern has been mitigated to some extent by the Commission's adoption of the Joint Board's recommendation for an indexed cap on the USF for the next thirteen months.[24] There is, however, one complicating factor: any increase in the USF draw of any USF recipient also reduces the amounts other USF recipients receive. As a consequence, errors of estimation in the potential impact on USF may mask the adverse effects upon the support that other LECs receive. While we are inclined to agree with the Petitioners that, based on their estimates, the combined impact of this waiver request will not adversely affect the USF, the waiver could lower the support received by other USF recipients by an amount that could prove to be significant if the Petitioners' estimates are too low.[25] We therefore grant the requested study area waiver, subject to the condition that any USF increase associated with the sale of the five GTE California exchanges to Citizens not exceed $839,796 per calendar year. We thus conclude, as conditioned above, that the USF program will not be adversely affected by the study area waivers that the Petitioners have requested.

State Commission Approval

12. The Oregon and California Commissions have approved the transactions, and the petition is not opposed by any party. Accordingly, we conclude that the second criterion for granting a study area waiver (*i.e.*, that the state commission does not object to the change in study area boundaries) has been satisfied.

Public Interest Findings

13. The third criterion for determining whether a study area waiver should be granted is whether the public interest supports granting the waiver. We believe the Petitioners here have provided such a showing. Citizens states it plans to install digital switches and make other plant improvements in the acquired exchanges. Citizens contends that these improvements will enable it to expand the range and quality of service to these customers. It also argues that the acquisition of these exchanges will provide substantial operational and economic efficiencies that would accrue to the benefit of these customers.[26]

14. We conclude, based upon the record before us as a whole, that the Petitioners have made the necessary showings that granting the requested waiver petition will improve customer service and thus promote the public interest. As stated above, the Oregon Commission has approved the merger of the two GTE study areas. In addition, the California Commission has authorized Citizens to provide service to the fivepurchased exchanges, and the condition contained in paragraph 11 *supra*, will preclude significant adverse effects upon the USF and its recipients. Therefore, we grant the study area waiver petition: to permit GTE Northwest to change its Oregon study area boundary to include the Contel study area; to permit GTE California to remove the five exchange areas from its California study area; and to permit Citizens to add those exchange areas to its existing California study area subject to the condition that the increase in USF payments that result from the transfer of exchanges and upgrading of the facilities not exceed $839,796 per annum.

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[21] Equal access allows an interexchange carrier's ("IXC's") customers to place calls on that carrier's network by dialing 1 plus the area code and number (1+) instead of dialing extra digits. With equal access, customers have the choice of which IXC to access by dialing 1+.

[22] *Id.*

[23] *See Order Adopting Recommendations*, 50 Fed. Reg. at 939.

[24] The Commission recently adopted the Joint Board's recommendation for an indexed cap on the USF. The Joint Board recommended, and the Commission adopted, interim rules that would limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommended Decision"), *adopted* by the Commission, 9 FCC Rcd 303 (1993) ("Interim Order").

[25] The Bureau is concerned that the increased number of proposed transactions, of which this is but one, could, in the aggregate, have a substantial effect on the amounts that other USF recipients will receive. In the past, the actual USF impact in several cases has risen far above the amount petitioners suggested when they sought study area waivers. *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF support grew from $82,500 in 1991 to $396,910 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[26] Citizens petition for waiver at 6-7.

V. PRICE CAPS WAIVER

The Petition

15. Citizens also seeks waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. Citizens seeks a waiver of rule Section 61.41(c) to allow it to operate as a cost company, rather than a price cap company, despite its acquisition of existing price cap exchanges.

16. Section 61.41(c) of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[27] Under this rule, Citizens' acquisition of the five GTE California exchanges obligates it to exit the NECA pools and become subject to price cap regulation. Citizens argues that the rule's application in this instance is contrary to the public interest and would not serve the purposes for which the rule was adopted. Citizens contends that: the Commission's concern to prevent cost shifting between affiliates is not at issue here; and the concern to prevent a company from using acquisitions and choosing a regulatory system to "game" the system is also not raised by the facts in this petition.

Discussion

17. The Commission's rules governing mergers and acquisitions provide that when a non-price cap company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[28] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game" the system by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[29] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of "gaming" the system. Such cases might justify narrow waiver of the all-or-nothing rule.[30]

18. We find that there is good cause to grant Citizens a waiver of the all-or-nothing rule. The first concern cited by the Commission, cost-shifting between affiliates, is not applicable in this case because Citizens is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a company to "game" the system, could be a source of concern because GTE California's sale of the five exchanges will alter the network costs that comprise the basis for GTE California's current price caps.[31] GTE has stated, however, it will reduce its interstate revenue requirements to reflect the sale of the five exchanges to Citizens, and adjust its price cap indices accordingly.[32]

19. For the reasons described herein, we grant a waiver of the all-or-nothing rule for Citizens. For the present, we will continue to regulate Citizens as a cost carrier.

VI. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of Citizens Utilities Company, GTE Northwest Incorporated, and GTE California Incorporated for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED subject to the condition set forth above.

21. IT IS FURTHER ORDERED that the Petition of Citizens Utilities Company for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41 (c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

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[27] 47 C.F.R. § 61.41(c)(2).

[28] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order), modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), petitions for further recon. dismissed,* 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom Assoc. v. FCC,* 988 F.2d 174 (D.C. Cir. 1993), *further modification on recon.,* 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order), second further recon.,* 7 FCC Rcd 5235 (1992).

[29] *LEC Price Cap Reconsideration Order,* 6 FCC Rcd 2637, 2706.

[30] *Id.* at 2706, para. 149, n.207.

[31] The generic issue that is posed more generally by this set of circumstances is being considered by the Commission in CC Docket No. 94-1. The Commission may require automatic adjustment to price capped rates to reflect the costs that are being removed from price cap regulation after reviewing the record in that docket.

[32] GTE Nov. 23 Letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY — File No. W-P-C-6858

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone service in specific areas in Connecticut.

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 6, 1994

By the Chief, Common Carrier Bureau:

1. On November 18, 1994, the Commission adopted an order and authorization that conditionally granted the request of Southern New England Telephone (SNET) to extend and amend its existing Section 214 authorization to provide video dialtone (VDT) services on a trial basis.[1]

2. On November 21, 1994, after the adoption of the SNET VDT order, but prior to its release, the National Cable Television Association, Inc. (NCTA) filed a motion to dismiss SNET's application. In its motion, NCTA argues that SNET's Section 214 application fails to comply with the Commission's VDT rules. NCTA adds that its motion supplements its previous filing in this proceeding. Because the Commission granted SNET's request prior to NCTA's motion, we find that NCTA's motion is moot. Thus, we dismiss NCTA's motion.

3. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, NCTA's Motion to Dismiss is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[1] *See In the Matter of the Application of The Southern New England Telephone Company For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone service in specific areas in Connecticut*, File No. W-P-C-6858, FCC 94-297, released Nov. 22, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN

Petition for Reconsideration

of the Certification of
Solon Township, MI
to Regulate Basic Cable Rates
(MI1539)

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1994; Released: December 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 5, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Solon Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] On August 31, 1994, C-TEC submitted supplemental information in support of its petition pursuant to a recent Commission order.[2] The Township did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. In its petition, C-TEC asserts that its cable system is subject to effective competition because it serves fewer than 30 percent of the households within Solon Township, its franchise area.[8] Specifically, C-TEC states that it serves 22 of the 441 households within the franchise area, or approximately 5% of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[9] that indicates that there are 441 households (that is, occupied housing units)[10] in the Solon franchise area. C-TEC also submits a computer-generated print-out with subscriber information to support its claim that it serves 22 subscribers in the franchise area. Finally, C-TEC provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[12] C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its system serves less than 30 percent of the households

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[1] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 13, 1993. Its certification became effective on November 12, 1993.)

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[10] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *See Third Recon. Order*, 9 FCC Rcd at 4324.

in the franchise area. Thus, we find that C-TEC's system serving Solon Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan challenging the certification of Solon Township (MI1539) to regulate C-TEC's basic service cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Solon Township to regulate C-TEC's basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-168

In the Matter of

Modifying Renewal Dates for
Certain Stations Licensed Under
Part 74 of the Commission's Rules; and

Revising FCC Form 303-S, Application
for Renewal of License for Commercial
and Noncommercial AM, FM, or TV
Broadcast Stations, TV and FM Translator
Stations, and Low Power TV Stations

ERRATUM

Released: December 30, 1994

By the Chief, Mass Media Bureau

1. The *Report and Order* in the above-captioned proceeding, released on November 4, 1994, is amended by changing the expiration date listed for FM Translators in Montana, found in the Rule Amendatory Text for 47 CFR § 74.15(d)(10), from August 1, 1996, to August 1, 1998.

2. For further information on this *Erratum*, contact Rita McDonald at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 30, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S PETITION FOR WAIVER OF RULES TO PROVIDE 555 ACCESS SERVICE

On December 6, 1994, US West Communications, Inc. (US West) filed a petition seeking a waiver of the Commission's rules to allow it to establish new rate elements to recover the special costs of providing 555 Access Service. US West states that a waiver is necessary because the current rules do not provide for the recovery of costs associated with 555 Access Service.

US West describes 555 Access Service as a new service that will be offered as a Basic Service Arrangement under Open Network Architecture. US West states that 555 Access Service will provide a uniform, LATA-wide, 10-digit telephone number for enhanced service providers (ESPs), giving ESPs an easy-to-remember telephone number for customers and the use of the same 555 telephone number in multiple LATAs.

US West proposes to impose both recurring and non-recurring charges for the service. US West states that the costs associated with establishing the service will be recovered on a non-recurring basis. US West states that a recurring call processing rate element will be established to recover the costs incurred in the processing of 555 Access Service calls, processing and translating the 555 number into an 800 number, and billing and collection functions specific to the service.

Interested parties should file comments on this petition by **January 25, 1995**, and reply comments by **February 9, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application of Motorola Satellite Communications, Inc. for Authority to Construct, Launch and Operate a Low Earth Orbit Satellite System in the 1616-1626.5 MHz Band	File Nos. 9-DSS-P-91(87) CSS-91-010
Application of Mobile Communications Holdings, Inc. for Authority to Construct the ELLIPSO™ Elliptical Orbit Mobile Satellite System	File Nos. 11-DSS-P-91(6) 18-DSS-P-91(18)

ORDER

Adopted: November 25, 1994; Released: November 25, 1994

By the Chief, International Bureau:

1. Motorola Satellite Communications, Inc. ("Motorola") and Mobile Communications Holdings, Inc. ("MCHI") have each requested that certain material in applications recently filed with the Commission be withheld from public inspection as confidential financial or commercial information. On November 25, 1994, we informed Motorola and MCHI by telephone that their requests were denied.[1] We now supply a written explanation for those denials.

BACKGROUND

2. In its recent "*Big LEO Order*," the Commission required all applicants for licenses to demonstrate, among other things, their financial ability to meet the estimated construction, launch, and first-year operating costs of their proposed systems.[2] An applicant who wished to have its application considered immediately was required to demonstrate this financial ability by November 16, 1994.[3]

3. On November 16 we received six amended applications, including those filed by Motorola and MCHI. We placed the applications on public notice and asked for comments from interested parties by December 22, 1994.[4]

The MCHI Request

4. MCHI requested that Exhibit 3 of its amended application be treated as confidential. MCHI asserts that Exhibit 3 contains:

> detailed information about system costs and sources of funding. This information includes confidential business information relating to the system cost and revenues. In addition, MCHI has provided sensitive commercial and financial information including the details of negotiated equity, debt and other business arrangements; and information relating to third party investors, including publicly traded companies, who have asked for confidentiality.[5]

MCHI asks that Exhibit 3 "be withheld from public inspection in order to protect confidential commercial and financial information."[6] MCHI acknowledged that because submission of the materials in question was required by the Commission, a denial of its request would mean that all of the materials would be made available for public inspection under the Commission's rules.

5. On November 18, 1994, MCHI narrowed its request for confidentiality when it notified the International Bureau that it sought confidentiality only for five letters from persons involved or potentially involved in the financing of MCHI's proposed Ellipso system.[7] MCHI also offered to share even these five letters with counsel for other Big LEO applicants, provided these applicants executed a nondisclosure agreement substantially in the form submitted by MCHI and the Commission issued "an appropriate protective order." MCHI stated in this letter that without such a protective order, "it will be necessary to redact certain language from these items before disclosure."

6. On November 22, 1994, counsel for Big LEO applicant Loral/QUALCOMM Partnership, L.P. ("LQP") took issue with MCHI's request for confidentiality, even as narrowed by MCHI's November 18 letter.[8] Counsel for LQP asserted that the information that MCHI sought to remove from public access did not qualify for confidential treatment under Exemption 4 of the Freedom of Information Act,[9] because: (1) there was no evidence that disclosure of the information would hinder the Commission's ability to obtain such information in the future; (2) there was no demonstration of any possibility of substantial competitive harm from disclosure of the information; and (3)

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[1] *See* 47 C.F.R. § 0.459(g).

[2] In re Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 59 Fed. Reg. 53294 (October 21, 1994) (the "*Big LEO Order*"). ¶ 38.

[3] *Big LEO Order* ¶ ¶ 39-42, 230.

[4] Public Notice, Report No. DS-1481 (released Nov. 21, 1994).

[5] MCHI Request at 1, ¶ 2.

[6] MCHI Request at 2.

[7] *See* Letter from Jill Abeshouse Stern, counsel for MCHI, to Scott Blake Harris, Chief of the International Bureau (Nov. 18, 1994). Four of the letters for which MCHI continues to request confidentiality were addressed to Dr. David Castiel, Chairman and CEO of MCHI. They were written by (1) David Archer, Executive Director, Spectrum Network Systems Ltd.; (2) Allister F. Fraser, Vice President, AEC-Able Engineering Co., Inc.; (3) John K. Keitt, Jr., Attorney-in-Fact, Cable & Wireless plc; and (4) Trevor Nash, Director, Barclays de Zoete Wedd. The fifth letter was from Milton S. Goldstein, Vice President, Satellite Transmission Systems, Inc., to Jeff Amerine, Ellipso Program Manager.

[8] Letter from William D. Wallace, Attorney for LQP, to Scott Blake Harris, Chief, International Bureau (Nov. 22, 1994).

[9] 5 U.S.C. § 552(b)(4).

the Commission generally discloses financial information that is relevant to a significant and material fact in a Commission proceeding. LQP contended that other Big LEO applicants could not properly comment on MCHI's application without seeing all of the information submitted by MCHI.

The Motorola Request

7. Motorola requested confidentiality for one page of its amended application: a table showing the projected investment and operating costs of Motorola's Iridium system for the years 1999-2003. Motorola based its request for confidentiality on the assertion that "this information could provide competitors with sensitive information about Motorola's operating costs." Motorola also argued that no party would be harmed by withholding the information from public inspection, because the operating costs for these years were not "decisionally significant" under the financial qualification rules adopted in the Commission's *Big LEO Order*.

DISCUSSION

8. The Commission's rules automatically remove certain types of records from the class of documents "routinely available for public inspection."[10] Other information is withheld from public inspection only if the person submitting the information specifically requests confidentiality, and only if that request includes "a statement of the reasons for withholding the materials from inspection . . . and of the facts upon which those reasons are based."[11] The appropriate Bureau or Office Chief "is directed to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act."[12]

9. The Commission has clearly set forth the standard that is to be applied in determining whether Exemption 4 applies to information submitted to the Commission:

> Generally speaking, financial information is confidential [under Exemption 4] if its disclosure would either impair the Government's ability to obtain this information in the future or cause substantial competitive harm to the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d [765,] 770 [(D.C. Cir. 1974)]. In order to satisfy the second prong of this test, the party claiming confidentiality must demonstrate actual competition and a likelihood of *substantial competitive injury* if the information is disclosed.[13]

10. The Commission has also made it clear that confidentiality requests must be much more than *pro forma* incantations of code-words like "sensitive" or "confidential." In fact, the Commission's rules provide that "[c]asual requests" which do not contain the required statement of both a rationale and a factual basis for withholding information "will not be considered."[14] And even where requests are formally considered, a party seeking to demonstrate that disclosure will cause substantial competitive harm must do more than go through the motions. "While an elaborate economic analysis need not be made to establish a likelihood of substantial competitive injury, conclusory and generalized allegations' cannot support nondisclosure."[15]

11. Both of the requests for confidentiality at issue here fall well below the minimum standards of Exemption 4 as interpreted by the Commission. Neither MCHI nor Motorola even attempts to argue that disclosure of the information in question, which the Commission required these applicants to submit, would impair the Commission's ability to obtain such information in the future. Neither MCHI nor Motorola offers even a hypothetical scenario illustrating any sort of competitive harm. And neither MCHI nor Motorola provides any analysis whatsoever of the likelihood that any such harm might actually occur. Indeed, MCHI's contention about competitive harm is particularly weak in light of its offer to share the information with its direct competitors while hiding it from the rest of the public.

12. Motorola's argument that the information it seeks to protect from disclosure is not "decisionally significant" is also unavailing. The Commission's rules clearly require Motorola to satisfy Exemption 4 in order to justify nondisclosure. Even if there is some connection between Exemption 4 and "decisional significance" (which is not immediately obvious to the Bureau), Motorola totally failed to point the connection out in its request for confidentiality. Certainly Motorola's request does not "present[] by a preponderance of the evidence a case for non-disclosure consistent with the Freedom of Information Act."[16]

13. Finally, Motorola purports in its request to "reserve[] the right to have [the ostensibly confidential information] returned without further disclosure" in the event that it is denied confidential treatment. As MCHI appears to recognize, the Commission's rules are quite explicitly to the contrary: "If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection."[17]

14. Accordingly, IT IS ORDERED that MCHI's request for confidential treatment of the letters listed in footnote 7 of this Order IS hereby DENIED.

15. IT IS FURTHER ORDERED that Motorola's request for confidential treatment of the single page showing the investment and operating costs of the Iridium system for the years 1999-2003 IS hereby DENIED.

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[10] 47 C.F.R. § 0.457.
[11] 47 C.F.R. § 0.459(b).
[12] 47 C.F.R. § 0.459(d).
[13] In re MTS & WATS Market Structure, 4 F.C.C. Rcd. 6527, 6528 (1989) (emphasis added). *See generally* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 877-79 (D.C. Cir. *en banc* 1992), *cert. denied*, 113 S. Ct. 1579 (1993).
[14] 47 C.F.R. § 0.459(b).
[15] In re National Exchange Carrier Ass'n, Inc., 5 F.C.C. Rcd. 7184, 7184 (1990) (quoting National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 680-81 (D.C. Cir. 1976)).
[16] 47 C.F.R. § 0.459(d).
[17] 47 C.F.R. § 0.459(e).

16. IT IS FURTHER ORDERED that the information described in paragraphs 14 and 15 of this Order be withheld from public inspection until the close of business on December 2, 1994, in order to give MCHI and Motorola an opportunity to file an application for review by the Commission.

17. IT IS FURTHER ORDERED that this Order be effective upon its adoption on November 25, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Hampton Roads, Inc. CUID No. VA0166
Virginia Beach, Virginia

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1994; Released: November 18, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Cox Cable Hampton Roads, Inc. ("Cox") was charging for its cable programming service ("CPS") tier in Virginia Beach, Virginia, CUID No. VA0166. Cox has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Cox's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Cox on November 12, 1993. The Commission received the complaint on November 15, 1993.

5. Cox attempted to justify its CPS price through an FCC Form 393 filed on December 13, 1993.[11] Cox amended its justification three times: on June 20, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally;[12] on September 6, 1994 in response to a Commission letter citing still unresolved deficiencies in Cox's amended showing;[13] and on October 25, 1994 in response to a telephone inquiry by the Commission.

DISCUSSION

6. Cox asserts that its monthly CPS tier price of $13.89 per subscriber is justified by its benchmark filing because its price equals the maximum permitted charge calculated in the filing. Upon review of Cox's FCC Form 393, as amended, we have found the following errors that require a recalculation of Cox's maximum permitted CPS price:

a. In calculating its leased customer equipment capital costs, Cox used a rate of return less than the 11.25% rate of return prescribed by the Commission (Form 393, Part III, Schedule C, Column F).[14] By not using the 11.25% rate of return prescribed, an

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cox has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cox implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration*; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] On November 15, 1993, Cox had filed a previous benchmark justification in response to three earlier complaints that were returned pursuant to 47 C.F.R. § 76.954.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Stephen D. Bryant, Controller, Cox Cable Hampton Roads, Inc. (Aug. 24, 1994).

[14] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5815 n.715 (1993). *See also Questions and Answers on Cable Television Rate Regulation*, Question and Answer No. 15 (released May 6, 1994) ("Therefore, in completing Forms 1205 and 393, operators must include an 11.25% return on equipment and installation charges before unbundling equipment and installation charges.").

operator could effectively increase its CPS price. Furthermore, this approach leaves a portion of an operator's equipment costs bundled with its programming charge. We therefore recalculate Column F (and subsequent steps) using a rate of return of 11.25%.

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Cox did not gross-up its tax entries. By placing entries in these columns, Cox confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C.[15] By not grossing-up its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using grossed-up tax entries.

c. In response to the Commission's rate regulations, on September 1, 1993, Cox restructured its rates. As part of this restructuring, Cox reduced its CPS price from $14.25 to $13.89 and increased its basic programming tier price from $6.63 to $8.33. These changes, however, are not reflected on Line 101 of Worksheet 1 of Part I I of Cox's FCC Form 393. Instead of entering its currently effective tier prices, as required by the directions for Line 101, Cox entered its previously effective tier prices.[16] On Line 101 Cox should have entered $8.33 instead of $6.63 as its basic service tier price and $13.89 instead of $14.25 as its CPS tier price.

d. Similarly, Cox's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue, Cox entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Cox's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. As a result, Cox's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Cox restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment revenue figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entry.[17] Accordingly, on Line 104 we enter $286,612.00 instead of $521,694.00.[18]

e. Cox's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) count channel 4 as a rate-regulated channel on the basic tier and channel 1 as a rate-regulated channel on the CPS tier. Both channel 1 and channel 4, however, carry identical programming shown at the same time.[19] Because subscribers receive only one programming service over channels 1 and 4, Cox cannot charge subscribers for these channels as separate units of cable service.[20] We therefore reduce the number of CPS-tier channels on Form 393, Part I, and Form 393, Part II, Worksheet 1, Line 102 from 30 to 29. We also reduce the number of rate-regulated channels used in calculating Cox's benchmark (Form 393, Part II, Worksheet 1, Line 121) from 48 to 47, and we reduce the number of satellite channels used in calculating the benchmark from 35 to 34.[21]

7. Because of these errors, we conclude that Cox has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must alsorecalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Cox apparently calculated the Inflation Adjustment Factor using data it relied on when it set its $13.89 CPS price. If based on this data Form 393 indicated that Cox's prices were reasonable, then Cox would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[22] However, Cox has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Cox timely filed FCC Form 393.[23] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of

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[15] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[16] The instructions for Line 101 of FCC Form 393 state: "In the relevant column, enter your *current* monthly charge for your basic service tier and for each tier of cable programming service that you offer to subscribers in the community unit for which the form is being completed." (emphasis added) (footnote omitted).

[17] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[18] On Line 34 of Step G of Part III, Cox entered $272,507.08. After grossing-up its federal taxes on Schedules A and C and revising its rate of return on Schedule C, Cox's Line 34 entry changes from $272,507.08 to $286,612.08.

[19] Letter from James A. Hatcher, Vice President & General Counsel, Cox Cable Communications, to Zenji Nakazawa (Oct. 25, 1994).

[20] We note that in all likelihood Cox receives this service over one signal. It is a relatively simple and inexpensive matter for an operator such as Cox to show a single signal to subscribers over multiple channels.

[21] Cox maintains that it did not count the second iteration as an additional satellite channel. Letter from James A. Hatcher to Zenji Nakazawa (Oct. 25, 1994). However, our count of the satellite channels carried by Cox as of the initial date of regulation, excluding channel 1, is 34.

[22] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[23] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the month preceding Cox's December 13, 1993 filing,[24] of 1.032.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $13.89 (as Cox calculated) to $13.71.

CONCLUSIONS

9. Upon review of the record herein, we conclude that Cox's showing supports a maximum reasonable CPS tier price of $13.71 per month (plus franchise fee) for the period November 15, 1993 to May 14, 1994.[25] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 12, 1993 complaint against the cable programming service price charged by Cox Cable Hampton Roads, Inc. in Virginia Beach, Virginia, CUID No. VA0166, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by Cox Cable Hampton Roads, Inc. with respect to Virginia Beach, Virginia, CUID No. VA0166, for the period of November 15, 1993 to May 14, 1994, justifies a maximum price of $13.71 per month (plus franchise fee) for Cox Cable Hampton Roads, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Cox Cable Hampton Roads, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from November 15, 1993[26] to May 14, 1994, that exceeded $13.71 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED, that Cox Cable Hampton Roads, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[24] The Inflation Adjustment Factor is calculated using the number of whole months between September 30, 1992, and the date of filing. FCC Form 393, page 11, instructions for Line 124.

[25] This finding is based solely on the representations of Cox listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[26] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESAT CABLEVISION, INC.

Petition for Reconsideration

of Certification of
Citrus County, Fla.
to Regulate Basic Cable Service Rates
(FCC Community ID No. FL0894)

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 16, 1993, Telesat Cablevision, Inc. ("Telesat") filed a timely petition for reconsideration challenging the certification of Citrus County, Florida ("County") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Telesat submitted its supplemental pleading inresponse to the Commission's July 29, 1994 Order.[2] The County did not file an opposition to Telesat's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Telesat argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the households in Citrus County, its franchise area.[8] Telesat claims that it serves only 6,618 of the 36,241 households (that is, occupied housing units)[9] within Citrus County, or 18.3 percent of the households. Alternatively, Telesat states that its penetration rate is 16.1 percent, still less than 30 percent, if the total number of subscribers is adjusted downward to reflect the 789 non "full-time" or "vacation status" subscribers.[10] As supporting documentation, Telesat provides a copy of the 1990 Census data[11] which shows that there are 36,241 households in the franchise area.[12] Telesat also submits a computer print-out with sufficient subscriber information to support its claim that it serves 6,618 subscribers in its franchise area.[13] Finally,

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[1] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial finding of Lack of Effective Competition" on October 14, 1993. Its certification became effective on November 13, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994)..

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's cable service. 47 C.F.R. § 76.905(a) and (b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*Third Recon. Order*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] Affidavit of David R. Rawdin, Senior Financial Analyst, dated August 19, 1994. "Vacation status" reflects those seasonal subscribers that remain a Telesat subscriber while not residing in the Citrus County franchise area for an extended period of time.

[11] As the Commission has stated recently the 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[12] *See* Exhibit 3 to Telesat's Supplement to Petition for Reconsideration. According to the 1990 Census data submitted by Telesat, there are 40,573 households in Citrus County. Telesat subtracts 1,658 households in the City of Crystal River, and 2,674 households in the City of Inverness, to arrive at a total of 36,241 unincorporated subscribers.

[13] According to Telesat's Management Summary Report, Telesat's Citrus County system had 789 subscribers on vacation status as of July 21, 1994. Management Summary Report, September 22, 1993 -- October 21, 1993, Cable Television Management System (CTMS).

Telesat provides an affidavit under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.[14]

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[16] Telesat has met this burden. Telesat appropriately relied on data reflecting the number of households as required by our rules.[17] Relying on this data, Telesat has submitted sufficient evidence demonstrating that its cable system serving its franchise area in Citrus County serves at the most 6,618 of the 36,241 households, or 18.3 percent of the households within its franchise area.[18] Thus, we find that Telesat's system serving Citrus County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Telesat Cablevision, Inc. challenging the certification of Citrus County, Florida to regulate Telesat's basic service cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Citrus County to regulate the rates for basic cable service and associate equipment of Telesat Cablevision, Inc. IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] Affidavit of Harry P. Cushing, III, President, dated August 19, 1994.
[15] 47 C.F.R. § 76.906.
[16] 47 C.F.R. § 76.911(b)(1).
[17] *Third Recon. Order, supra* note 9.
[18] We note that initially, Telesat stated, in an affidavit attached to its petition, that according to the Citrus County Appraiser's Office, there were 48,650 households in the unincorporated areas of Citrus County. Telesat claimed that it served 12.9 percent, or approximately 6,300 subscribers. Telesat did not provide documentation to support these numbers. In its supplement, however, Telesat submitted household data documentation which indicates that there are 36,241 households (that is, occupied housing units) in its franchise area. As Telesat's supplement contains the correct type of information, we will rely on it for purposes of reviewing this petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 94-153

In the Matter of

Amendment of Part 80 of the Rules Concerning a U.S. Coast Guard Vessel Traffic Service (VTS) System in Prince William Sound on marine VHF Channel 11 — RM-8199

NOTICE OF PROPOSED RULE MAKING

Adopted: December 16, 1994; Released: January 3, 1995

Comment Date: February 24, 1995
Reply Comment Date: March 13, 1995

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making (NPRM) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to add Prince William Sound to the United States Coast Guard (Coast Guard) designated radio protection areas for mandatory Vessel Traffic Services (VTS) and establish marine VHF Channel 11 (156.550 MHz) as the VTS frequency for Prince William Sound. We are proposing these rules at the request of the Coast Guard.[1] Public Notice of the Coast Guard's petition (RM-8199) was given on March 18, 1993 (Report No. 1932). No one filed comments.

II. BACKGROUND

2. The Coast Guard uses VTS systems as an advisory communications service to coordinate vessel movement and prevent collisions in large, busy port areas. Vessels report, by voice, information related to position, navigation and conditions affecting their ability to navigate to the Coast Guard, which tracks the vessel's movements. VTS systems use VHF marine channels dedicated to VTS operations in Coast Guard designated VTS areas. Presently, the Coast Guard operates a VTS system in Prince William Sound on marine VHF Channel 13 (156.650 MHz), that, unlike the present request for Channel 11, is not dedicated for VTS nor protected from interference. Channel 13 is the designated bridge-to-bridge channel and is also used for navigation related communications from the bridge of one ship to the bridge of another ship.

3. The Commission amended its Rules in 1975, at the Coast Guard's request, to make frequencies available in certain designated areas exclusively for VTS communications.[2] Since then, we have added a number of VTS protection areas such as San Francisco.[3] Currently, Section 80.383 of the Rules, 47 C.F.R. § 80.383, lists five areas - Seattle, New York, New Orleans, Houston and San Francisco - as Coast Guard designated VTS areas. Frequencies allotted for VTS communications are available for assignment outside of VTS designated areas for other purposes on a noninterference basis.[4]

III. DISCUSSION

4. As a result of the Oil Pollution Act of 1990,[5] the Coast Guard plans to implement a mandatory Automated Dependent Surveillance (ADS) system for cargo ships, *e.g.* oil tankers, that operate in Prince William Sound. The ADS will operate as part of the proposed VTS system and is scheduled to begin operation in July 1994. An ADS system works as follows: the vessel determines its position using a highly accurate differential GPS receiver and automatically transmits its position, identification and the time of the position to the Coast Guard using digital selective calling (DSC) techniques on VHF marine Channel 70 (156.525 MHz). The Coast Guard needs Channel 11 to supplement Channel 70 ADS use and for voice VTS communications in support of vessel traffic control operations.

5. Designating Prince William Sound as a VTS area will allow the Coast Guard to manage vessel traffic in that area more efficiently and protect the marine environment by preventing vessel collisions and groundings. We are proposing, therefore, to add Prince William Sound to the Commission's list of designated radio protection areas for VTS systems specified in Section 80.383. The radio protection area will be defined as "The rectangle between North latitudes 61 degrees 17 minutes and 59 degrees 22 minutes and West longitudes 149 degrees 39 minutes and 145 degrees 36 minutes."

6. Additionally, we propose to permit private coast stations currently authorized to operate on Channel 11 within the proposed Prince William Sound VTS area to continue operation until the end of their current license terms on a noninterference basis.[6] The staff will help affected licensees find suitable alternative channels. No fee will be charged for affected stations that apply for modification for an alternative channel before their next renewals.

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[1] Letter from Philip R. Sheldon to George Dillon (March 2, 1993).
[2] *Report and Order*, Docket No. 20444, 56 FCC 2d 1089 (1975).
[3] *Report and Order*, PR Docket No. 92-30, 8 FCC Rcd 1671 (1993).
[4] *e.g.*, see footnote 3 of Section 80.373(f) of the Rules.
[5] Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.
[6] There are currently 6 licensed private coast stations within the proposed designated radio protected area that would be affected by this proposal.

IV. CONCLUSION

Regulatory Flexibility Act

7. We certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. No. 96-354), 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981) does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities as defined by Section 601(3) of the Regulatory Flexibility Act. Affected licensees will be assisted to arrange alternative channels for their use. The proposed rule would promote vessel safety by adding Prince William Sound to the list of designated radio protection areas for VTS systems contained in the Commission's Rules. The Coast Guard has proposed rules requiring mandatory VTS participation in the Prince William Sound area. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy for the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seg.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47. C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **February 24, 1995**, and reply comments on or before **March 13, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

10. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

Contact Person

11. For further information concerning this proceeding, contact James Shaffer, Private Radio Bureau, (202) 632-7197.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 80, is proposed to be amended as follows:

Part 80 -- Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.383 is amended by revising the table in paragraph (a) to add Prince William Sound to the list of geographic areas for the carrier frequency 156.550 MHz; amending paragraph (b)(4) by removing the final "and"; amending paragraph (b)(5) by replacing the final "." with "; and"; and adding a new paragraph (b)(6) to read as follows:

§ 80.383 Vessel Traffic Services (VTS) system frequencies.

* * * * *

(a) Assigned frequencies:

VESSEL TRAFFIC CONTROL FREQUENCIES

Carrier frequencies (MHz)	Geographic areas
* * * * *	
156.550	New York, New Orleans,[1] Houston, Prince William Sound.[2]
* * * * *	

[1] * * *

[2] Private coast station licenses for the use of this frequency will expire five years after the adopted date of the final rule. Continued use until expiration must be on a noninterference basis to Coast Guard VTS communications.

(b)***

(6) *Prince William Sound* . The rectangle between North latitudes 61 degrees 17 minutes and 59 degrees 22 minutes and West longitudes 149 degrees 39 minutes and 145 degrees 36 minutes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Churchill Township, MI
to Regulate Basic Cable Rates
(MI1329)

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1994; Released: December 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 4, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Churchill Township (the "Township") to regulate rates for basic cable service and associated equipment.[1] On August 31, 1994, C-TEC submitted supplemental information in support of its petition pursuant to a recent Commission order.[2] The Township did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. In its petition, C-TEC asserts that its cable system is subject to effective competition because it serves fewer than 30 percent of the households within Churchill Township, its franchise area.[8] Specifically, C-TEC claims that it serves 114 of the 456 households within the franchise area, or 25 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[9] which indicates that there are 456 households (that is, occupied housing units)[10] in the Churchill franchise area. C-TEC also submits a computer-generated print-out with sufficient subscriber information to support its claim that it serves 114 subscribers in the franchise area. Finally, C-TEC provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[12] C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, C-TEC has submitted sufficient evidence that its system serves fewer than 30 percent of the households in the

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[1] The Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 19, 1993, which became effective on November 18, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ("*Effective Competition Order*").

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[9] The Commission stated recently that the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[10] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*"). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *See Third Recon. Order*, 9 FCC Rcd at 4324.

franchise area. Thus, we find that C-TEC's system serving Churchill Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan challenging the certification of Churchill Township to regulate C-TEC's basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Churchill Township to regulate basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1994

US WEST REQUESTS EXTENSION OF WAIVER OF SINGLE BILL REQUIREMENT -- CC DOCKET NO. 87-579

Pleading Cycle Established

COMMENTS: November 30, 1994
REPLY COMMENTS: December 7, 1994

On November 1, 1994, US West Communications (US West), asked the Commission to extend US West's waiver of the Commission's single bill requirement.[1] US West requests a temporary extension of its waiver of the single bill requirement for only those cases in which its meet point billing contracts with other participating non-Tier I local exchange carriers have been cancelled, and the parties have been unable to reach an agreement on new terms and conditions. In addition to its petition for waiver, US West concurrently filed a petition for rulemaking (RM No. 8540) concerning access billing requirements for joint service provision, which proposes the elimination of the single bill requirement. (*See* Public Notice, Report No. 2040, released Nov. 7, 1994, soliciting comments on US West's petition for rulemaking.)

US West seeks to extend the waiver of the single bill requirement until either December 31, 1995, approximately 12 months after the expiration of US West's current waiver, or until the Commission has acted on US West's petition for rulemaking, whichever occurs later.

Interested parties may file comments on US West's petition for extension of a waiver of the single billing requirement no later than November 30, 1994. Replies must be filed by December 7, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 CFR § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington D.C. 20554.

For further information, contact Katherine Schroder, Tariff Division, Common Carrier Bureau, (202) 418-1530.

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[1] *See In the Matter of Access Billing Requirements for Joint Service Provision, Order*, 65 Rad. Reg. (P&F) 2d 650 ¶ 95 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of Certification of
Tyrone Township, MI (MI0983)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 15, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration, challenging the certification of Tyrone Township, Michigan ("Tyrone") to regulate C-TEC's rates for basic cable service and associated equipment.[1] In response to a recent Commission Order,[2] on August 19, 1994, C-TEC filed additional documentation in support of its original petition. In response to a staff inquiry, C-TEC filed supplementary information on November 9, 1994. Tyrone did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, a franchising authority may rely on the presumption that cable operators within its jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[4] Such certification becomes effective thirty days after filing, unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within thirty days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition in Tyrone Township, its franchise area,[8] because it serves fewer than thirty percent of the households in the franchise area.[9] C-TEC contends that it serves 65 of the 820 households (that is, occupied housing units)[10] or approximately eight percent of the households in Tyrone Township. As support, C-TEC submits a copy of the relevant page from the 1990 census[11] which demonstrates that there are 820 households in Tyrone Township. In addition, it submits a copy of its billing data which indicates that C-TEC has 65 subscribers. Finally, C-TEC submits a declaration under penalty of perjury from a company official.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by § 76.905 of the Commission's rules, is present within the franchise area.[13] C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of "households" as required by our rules.[14] Relying on this data, C-TEC has submitted sufficient evidence demonstrating

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[1] Tyrone submitted its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" ("FCC Form 328") on October 19, 1993. Its certification became effective on November 18, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations, applicable to rate regulation proceedings by the franchising authority, do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c)(1).

[8] C-TEC has separate franchise agreements with the villages of Casnovia and Kent City. Thus, these areas are not included in the Tyrone Township franchise area.

[9] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system. 47 C.F.R. §§ 76.905(a) and (b)(1).

[10] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census US Dept of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Commission has stated previously 1990 census data is an appropriate source for household data.

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R. § 76.911(b)(1).

[14] *Third Recon. Order, supra.*

that its cable system serving Tyrone Township, its franchise area, serves 65 of the 820 households or 8 per cent of the households within its franchise area.[15] Thus, we find C-TEC's system serving Tyrone Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Tyrone Township to regulate rates, IS GRANTED.

6. IT IS FURTHER ORDERED that the Certification of Tyrone Township, Michigan, to regulate the basic cable service rates of C-TEC Cable Systems of Michigan, Inc., IS RESCINDED.

7. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[15] Initially, C-TEC indicated that there were 841 homes in its franchise area. The data was apparently based on the number of housing units within the franchise area. In its supplement, however, C-TEC submits data indicating that there are 820 households in the franchise area. As C-TEC's supplement contains household data, the appropriate household data, we have relied upon it for purposes of our analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF
MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Vassar Township, MI
to Regulate Basic Cable Service Rates
(MI0800)

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 12, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Vassar Township, MI ("Vassar") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, C-TEC filed supplemental information to its original petition pursuant to a recent Commission Order.[2] Vassar Township did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the households in Vassar Township, its franchise area.[8] Specifically, C-TEC claims that it serves only 228 of the 1,296 households (that is, occupied housing units)[9] in Vassar Township, or 17.6 per cent of the total number of households. As supporting documentation, C-TEC provides a copy of 1990 Census data[10] which indicates that there are 1,296 households in Vassar. C-TEC also submits a computer-generated print-out with sufficient subscriber information to support its claim that it serves 228 subscribers in its franchise area. Finally, C-TEC provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] C-TEC has met that burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, C-TEC has submitted sufficient evidence demonstrating

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[1] Vassar filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 15, 1993. The certification became effective on November 14, 1993.

[2] *See In the Matter of Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. § 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. 47 C.F.R. § 76.905(a) and (b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Michigan, 1990 CPH-1-24, Table 7 at 180.

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *Third Recon. Order, supra*.

that its cable system serves 228 of the 1,296 households in Vassar Township, or 17.6 per cent of the households, within its franchise area. Thus, we find that C-TEC's system serving Vassar Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Vassar Township, MI to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Vassar Township, MI to regulate C-TEC Cable Systems of Michigan, Inc.'s basic cable service rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of the Certification of
Victor Township, MI
to Regulate Basic Cable Service Rates
(MI1061)

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 15, 1993, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition for reconsideration challenging the certification of Victor Township ("Victor") to regulate rates for basic cable service and associated equipment.[1] Victor filed an objection to petition for reconsideration to which Horizon filed a reply. Victor filed a response on January 7, 1994. Both Horizon and Victor filed supplements pursuant to a recent Commission Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Horizon argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the households in Victor Township, its franchise area.[8] Specifically, Horizon states that it serves 222 of the 936 "homes" within its franchise area, or 23 percent of the total number of homes. As supporting documentation, Horizon submits a copy of the relevant page from the 1990 Census data which indicates that there are 936 "housing units" in Victor Township. In addition, Horizon submits a copy of a computer printout which indicates that Horizon served 222 subscribers. Finally, Horizon submits a declaration from the cable system's general manager.[9]

Horizon's Effective Competition Claim

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[11] Horizon has not met this burden. Specifically, Horizon inappropriately relied upon "housing unit" data rather than "household" data to support its effective competition claim. Horizon's claim is inappropriately based on the number of housing units (that is, occupied and vacant units) within the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[12] As Horizon has failed to base its effective competition claim on household data as required by our rules, we will deny its petition.

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[1] Victor filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on November 8, 1993. The certification became effective on December 8, 1993.

[2] *See In the Matter of Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. 47 C.F.R. § 76.905(a) and (b)(1).

[9] Declaration of Alan Baird, General Manager, dated November 11, 1993.

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R.§ 76.911(b)(1).

[12] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census,

Other Matters

5. In its objection to Horizon's petition, Victor argues that Horizon is not subject to effective competition because Horizon has made an affirmative decision to serve only limited sections of its franchise area. According to Victor, Horizon's actual service area consists of 452 households, of which Horizon serves 222. Under this redefined franchise area, Victor argues that Horizon actually serves 49 percent of households. Thus, Victor argues that Horizon has not demonstrated that its system is subject to effective competition. In reply, Horizon denies affirmatively restricting its cable service to limited areas of Victor Township. Horizon points out that its franchise agreement with Victor requires Horizon to expand into unserved areas of the Township when the population density reaches a level of 40 households per cable mile. Horizon states that not only has it complied with the franchise agreement, but it has expanded beyond the franchise requirement. Horizon concludes that the mere presence of unserved areas within the franchise area is insufficient evidence that a cable operator has limited service to specific communities. In light of our decision that Horizon has failed to rely on appropriate housing data for purposes of demonstrating effective competition, we see no need to address Victor's argument at this time.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of Victor Township to regulate basic cable rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that Horizon Cable I Limited Partnership SHALL FILE the required rate justifications on the applicable forms with Victor Township within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Victor Township that it is regulating Horizon's rates, whichever is later.

9. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUENAVISION TELECOMMUNICATIONS
OF BOYLE HEIGHTS, INC.

Petition for Reconsideration
of Certification of the
City of Los Angeles, California
to Regulate Basic Cable Rates (CA1285)

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 7, 1993, Buenavision Telecommunications of Boyle Heights, Inc. ("Buenavision") filed a timely petition for reconsideration challenging the certification of the City of Los Angeles ("City") to regulate Buenavision's rates for basic cable service and associated equipment.[1] The City filed an opposition to Buenavision's petition. In addition, both parties filed responses to requests from the Cable Services Bureau for additional information.[2] Also in response to a Bureau request,[3] Buenavision submitted a letter on November 21, 1994 clarifying certain aspects of its earlier submissions.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of the filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Regulation of rates is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.[8]

II. DISCUSSION

3. Buenavision claims that its system is subject to effective competition because fewer than 30 percent of the households in its franchise area subscribe to its cable service.[9] Specifically, Buenavision claims that, as of October 31, 1993, it served 2,321 subscribers in an area with 23,014 "households." As support, Buenavision submits a copy of its "Schedule of Subscribers and Services" which indicates that its system served 2,321 subscribers as of October 31, 1993. In addition, Buenavision provides a copy of a "Boyle Heights Address Count" which includes a list of addresses for residences, multiple dwelling units, and commercial entities within the franchise area. This count indicates that there are 23,014 addresses within the franchise area. Buenavision also provides data from the "Los Angeles County 1990 Census Population and Housing Counts by Major and Minor Statistical Areas" which shows that there are 24,733 "dwelling units" in Boyle Heights. Thus, Buenavision apparently has determined that it serves either 10.1% or 9.4% of the "households" in its franchise area, depending on which household count is used.

4. For its part, the City only argues that Buenavision's level of penetration is not a function of competition between two or more multichannel video programming distributors. It states that it has determined that effective competition does not exist in Los Angeles and this knowledge is "based upon [councilmembers'] intimate knowledge of the services available in their Council district; and moreover from the first-hand anecdotal evidence and complaints they have received from their constituents." Accordingly, the City urges the Commission to revise its effective competition standards to permit the City to regulate rates.

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within

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[1] The City filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on October 13, 1993. Its certification became effective on November 12, 1993.

[2] *See* Letter dated July 26, 1994 from Lisa M. Higginbotham to Buenavision Telecommunications of Boyle Heights, Inc. and the City of Los Angeles.

[3] *See* Letter dated November 8, 1994 from Lisa M. Higginbotham to Baker & Hostetler, attorneys for Buenavision Telecommunications of Boyle Heights, Inc.

[4] 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulations proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise subscribe to the cable service of the cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[10] 47 C.F.R. § 76.906.

the franchise area.[11] Buenavision has failed to meet this burden. Buenavision has not demonstrated that its effective competition claim is based on the correct housing data. Our rules require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area.[12] Buenavision has not submitted sufficient evidence that its penetration level was measured using this data.

6. Specifically, we cannot accept either of Buenavision's household counts. In its November 21, 1994 letter to the Bureau, Buenavision acknowledges that the 24,733 total for "dwelling units" in Boyle Heights does not exclude vacant housing units. Similarly, Buenavision's "Boyle Heights Address Count" does not provide conclusive evidence of the total number of households in the franchise area. As mentioned above, the address count includes a total of 23,014 residences, multiple dwelling units, and commercial entities within the franchise area. There is no indication that these residences and multiple dwelling units are occupied.[13] Furthermore, Buenavision improperly relied on the number of commercial addresses to support its effective competition claim. The three alternative tests for effective competition are based on the term "household." As the Commission stated previously, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census . . . ."[14] As the 1990 Census does not include commercial entities in the count of "households," we find that Buenavision's inclusion of commercial entities was inappropriate. Accordingly, since neither of Buenavision's household counts was determined in accordance with the Commision's Rules, its petition is denied.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Buenavision Telecommunications of Boyle Heights, Inc. challenging the certification of the City of Los Angeles to regulate Buenavision's basic cable service rates IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

9. IT IS FURTHER ORDERED that Buenavision SHALL FILE the required rates jusitifications on the appropriate rate forms with the City of Los Angeles within 30 days of the release date of this *Memorandum Opinion and Order* or within 30 days of receipt of notice from the City of Los Angeles that it is regulating Buenavision's basic cable service rates, whichever is later.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] 47 C.F.R. § 76.911(b)(1).

[12] As the Commission stated recently, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

[13] In its November 21, 1994 letter, Buenavision claims that the use of "households" is impossible. However, it does not explain or support this assertion.

[14] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of the Certification of
Handy Township, MI
to Regulate Basic Cable Service Rates
FCC Community ID No. (MI0612)

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 15, 1993, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition for reconsideration challenging the certification of Handy Township, MI ("Handy") to regulate Horizon's rates for basic cable service and associated equipment.[1] Handy filed an opposition to which Horizon filed a reply. On August 19, 1994, Horizon filed a supplement to its original petition pursuant to a recent Commission Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

Horizon's Effective Competition Claim

3. Horizon states that it is subject to effective competition because its system has less than 30 percent penetration in Handy Township, its franchise area.[8] Horizon states that it serves 274 of the 1,957 "homes" within its franchise area, or 14 percent of the total number of homes. As support, Horizon submits a copy of the relevant 1990 Census data which reveals that there are 1,957 "housing units" within Handy Township. In addition, Horizon submits a computer printout of its subscriber data which reflects that there are 274 subscribers as of October 21, 1993. Horizon also submits a declaration under penalty of perjury from its general manager.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[10] Horizon has failed to meet this burden. Specifically, Horizon inappropriately relied upon "housing unit" data rather than "household" data to support its effective competition claim. Horizon's claim is inappropriately based on the number of housing units (that is, occupied and vacant units) within the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon Order"*).[11] Horizon's claim is based on

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[1] Handy filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Competition" (FCC Form 328) on September 29, 1993. Its certification became effective on October 29, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd. 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 per cent of the households in the system's franchise area subscribe to the cable service of a cable system 47 C.F.R. § 76.905(a) and (b)(1).

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied

the number of housing units (occupied and vacant). As Horizon has failed to base its effective competition claim on household data as required by our rules, we will deny its petition.

Other Matters

5. In opposition to Horizon's petition, Handy states that Horizon is not subject to effective competition because it has "redefined" its franchise area. As support, Handy attaches as Exhibit A, a map of Handy Township, with handwritten notations that it claims shows Horizon's alleged "franchise area" for purposes of the "effective competition" standard. According to Handy, Horizon's actual service area consists of 432 households, of which Horizon serves 274. Under this redefined franchise area, Handy argues that Horizon actually serves 63 percent of the households and, therefore, is not subject to effective competition. In reply, Horizon denies Handy's allegation asserting that the terms of its franchise agreement with Handy requires Horizon to expand into unserved areas of the township when the population density reaches a level of 20 households per cable mile. Horizon states that not only has it complied with the franchise agreement, but it has expanded beyond the franchise requirement. Horizon argues that "[r]ather than restricting its service to a small portion of the franchise area, Horizon has expressed a willingness to provide service to additional homes within the franchise area as the population density increases," and that the mere presence of unserved areas within the franchise area does not limit service to specific communities. In light of our decision that Horizon has failed to rely on appropriate housing data for purposes of demonstrating effective competition, we see no need to address Handy's argument at this time.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of Handy Township, MI IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that Horizon SHALL FILE the required rate justifications on the applicable forms with Handy Township within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Handy Township that it is regulating Horizon's rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ML MEDIA PARTNERS, L.P.
TRADING AS MULTIVISION
CABLE TV

Request for Stay of
Local Rate Order of the
City of Fairfield, California

AMENDED ORDER

Adopted: December 1, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

1. On November 10, 1994, we issued an Order in this proceeding granting a stay request made by ML Media Partners, L.P., d/b/a Multivision Cable TV ("Multivision"), the franchisee in the above matter.[1] In that Order, we stated that the City of Fairfield, California ("City") had not filed any pleadings in opposition to the stay request. The City had, in fact, submitted an opposition to the stay request on September 2, 1994. Multivision subsequently submitted a reply to that opposition on September 8, 1994. Accordingly, and on our own motion, we now reconsider that decision. Upon review of the responsive pleadings, we conclude that our decision to grant the stay request remains the same.

2. The local rate order adopted by the City establishes a new rate schedule for Multivision's basic service tier, associated equipment, and installations, and directs Multivision to issue refunds to subscribers for charges assessed since September 1, 1993 which were in excess of the newly established rates.[2] The main issue raised by Multivision in its petition involves the proper regulatory treatment of Multivision's a la carte offerings.[3] Multivision argues that, absent a stay, it will be harmed irreparably. Further, it argues that a stay is in the public interest. The City opposes Multivision's Request for Stay and argues that Multivision has failed to demonstrate that it will suffer irreparable harm or that the public interest favors the granting of a stay. Multivision replies that the City has conceded that Multivision would be harmed if the Commission reverses the City's order but is unable to provide for recovery of refunds paid by Multivision.

3. The regulatory treatment of a la carte offerings is the subject of numerous Letters of Inquiry issued by the Commission to cable operators.[4] While a Letter of Inquiry has not been issued to the operator in this case, we will grant Multivision's petition pending the resolution of its Appeal in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other cases involving the a la carte issue.[5]

4. During the period of this stay, Multivision is ordered to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Multivision to refund to its customers. Alternatively, Multivision may elect to post a bond for the benefit of the City. The amount of the bond shall be the total amount of money subject to the refund order, plus intereston that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Multivision is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the City, on behalf of Multivision's subscribers.[6]

5. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Fairfield, California is STAYED pending the resolution of Multivision's Request for Review.

6. IT IS FURTHER ORDERED that the amount of the refunds required by the City of Fairfield, California's local rate order SHALL BE PLACED by Multivision in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the City of Fairfield in the amount of money the City of Fairfield has ordered Multivision to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Multivision's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

7. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

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[1] *See ML Media Partners, L.P., Trading as Multivision Cable TV* (Fairfield, CA), DA 94-1246 (rel. November 10, 1994).

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[3] In addition, Multivision takes issue with the calculation of hourly service charges, the deletion of "cap labor inside wiring" costs and disallowance of the home wiring maintenance fee.

[4] Very recently, we have begun to issue orders involving those Letters of Inquiry. *See, e.g., Adelphia Cable Partners, L.P., South Dade County, Florida*, LOI-93-42, DA 94-1277 (rel. November 18, 1994).

[5] *See Century Cable of Southern California* (Brea, CA), DA 94-512 (rel. May 17, 1994); *Century Cable of Southern California* (La Habra, CA), DA 94-513 (rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (rel. May 17, 1994); and *Paragon Cable* (Grapevine, TX), DA 94-1072 (rel. September 30, 1994).

[6] *See Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 30, 1994

JOINT PETITION FILED FOR WAIVER OF SECTIONS 61 AND 69 OF THE PRICE CAP RULES

Comments: December 14, 1994
Reply Comments: December 21, 1994

On October 3, 1994, Rochester Telephone Corporation (Rochester), Mid-South Telecommunications Company, Inc. (Mid-South), Ontonagon County Telephone Company (Ontonagon) and Midway Telephone Company (Midway) jointly filed a petition for waiver of the Commission's local exchange carrier (LEC) price cap rules to the extent necessary to effectuate the sale of Ontonagon by Rochester to Mid-South.

Rochester is a New York telephone corporation that provides LEC service to approximately 500,000 access lines in western central New York. Ontonagon and Midway are currently two of Rochester's exchange carrier subsidiaries, serving approximately 4,900 access lines in the Upper Peninsula region of Michigan. At the time Rochester acquired Ontonagon and Midway, both were cost companies that participated in the traffic sensitive and common line pools administered by the National Exchange Carrier Association (NECA). When Rochester elected price cap regulation, it withdrew its cost-based affiliates, including Ontonagon and Midway, from participation in NECA Tariff F.C.C. No. 5. The withdrawal became effective on July 1, 1991. Since then, Ontonagon and Midway have been governed by the Commission's price cap form of regulation.

Rochester and Mid-South entered into an agreement, in which Mid-South will acquire all issued and outstanding shares of Ontonagon from Rochester. Upon consummation of this agreement, Mid-South will operate three exchange carriers - Ontonagon, Midway and S&A Telephone Company, Inc.

Jointly the companies request that the Commission grant a waiver of portions of Part 61 and 69 of the Commission's Rules, regarding Price Caps, so that, effective upon the acquisition: (a) Ontonagon and Midway may withdraw from price cap regulation and become subject to cost-of-service regulation; and (b) Ontonagon and Midway may re-enter the NECA traffic sensitive and common line pools and concur in NECA's Tariff F.C.C. No. 5.

Interested parties may file comments on the joint petition for waiver no later than **December 14, 1994**. Reply comments should be filed by **December 21, 1994**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its offices at 2100 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-97

In the Matter of

Southwestern Bell Telephone Company
Revisions to Tariff F.C.C. No. 73

Transmittal No. 2406

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1994; Released: December 8, 1994

By the Acting Chief, Tariff Division:

1. On December 6, 1994, Southwestern Bell Telephone Company (Southwestern Bell) filed Transmittal No. 2406 to revise its Tariff F.C.C. No. 73. Southwestern Bell states that the purpose of this filing is to modify its virtual collocation tariff[1] to add the complete rate structure and rate levels and to revise rates for certain equipment; to remove penalty charge language; and to clarify certain provisions of the tariff. Specifically, Southwestern Bell proposes to add the complete rate structure and rate levels for two pieces of ALCATEL equipment and two pieces of NEC equipment; add rate levels for the Fujitsu FLM 2400 OC-48 (1557 nm) equipment and revise the rates for the ADC SONEPLEX 2000 equipment. Southwestern Bell additionally proposes to modify the Unauthorized Occupation regulations to remove the penalty charge language. Southwestern Bell further proposes to incorporate various text changes in the tariff to clarify the provisions relating to the designation of dedicated equipment, microwave transmission facilities and nonrecoverable costs; and to clarify the provisions for bona fide requests for virtual collocation. Transmittal No. 2406 is scheduled to take effect on December 12, 1994.

2. This transmittal raises the same issues as the interim virtual collocation tariffs which were suspended for one day and made subject to investigation in the *Interim Tariff Suspension Order*.[2] Therefore, Transmittal No. 2406 is suspended for one day, until December 13, 1994, and will be subject to the investigation initiated in the *Interim Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Southwestern Bell Tariff F.C.C. No. 73, Transmittal No. 2406, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Southwestern Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Southwestern Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Southwestern Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] On July 25, 1994, the Commission released the *Virtual Collocation Order*, which required Tier 1 local exchange carriers (LECs) other than National Exchange Carrier Association pool members to file virtual collocation tariffs on September 1, 1994, with a scheduled effective date of December 15, 1994. Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), *appeal docketed sub nom.*, Southwestern Bell Telephone Company v. FCC, Case No. 94-1547 (D.C. Cir. Aug. 10, 1994) (*Virtual Collocation Order*). In conjunction with the *Virtual Collocation Order*, the Commission and the Tier 1 LECs reached an agreement whereby the LECs agreed to file "interim" virtual collocation tariffs on September 1, 1994 in order to facilitate the transition from physical to virtual collocation and to ensure that some form of collocation service was available at all times to interested customers. Following a one-day suspension period and the imposition of an accounting order, the interim tariffs became effective, subject to investigation, on September 4, 1994. Ameritech Operating Companies *et al*, Order, 9 FCC Rcd 5230 (Com. Car. Bur. 1994) (*Interim Tariff Suspension Order*).

[2] *See Interim Tariff Suspension Order*, 9 FCC Rcd at 5321 (para. 6).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI TKR OF HOUSTON, INC.

Petition for Reconsideration

of Certification of
City of Houston, Texas
to Regulate Basic Cable Service Rates
(FCC Community ID Nos. TX0755, TX0736,
TX0737, TX0748)

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 17, 1993, TCI TKR of Houston, Inc. ("TCI") filed a timely petition for reconsideration challenging the certification of the City of Houston ("The City" or "Houston") to regulate rates for basic cable service and associated equipment.[1] TCI and the City also filed responses in reply to our letters seeking further clarification.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. TCI argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the City of Houston, its franchise area.[8] Specifically, TCI claims that it serves only 51,161 of the 200,352 "homes" (occupied and vacant) in the City, or 25.5 percent of the total number of homes as of November 1993. As supporting documentation, TCI provides a copy of 1990 Census data which shows that there are 200,352 housing units in the City. TCI also submits a computer print-out with sufficient subscriber information to support its claim that it serves 51,161 subscribers in the franchise area.[9] In calculating this number, TCI excludes the 411 "free" accounts which represent the number of its employees receiving non-charged cable service. TCI also excludes the 172 "municipal accounts" required to be served under the franchise agreement.[10] Finally, TCI provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.[11]

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[13] TCI has not met this burden. Initially, TCI inappropriately deducted the number of its employees receiving cable service for no charge. TCI claims that such a deduction is consistent with the plain meaning of the term "subscriber" which TCI defines as a person "receiving something of a continuing or periodic nature on a prepay-

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[1] The City of Houston filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Competition" (FCC Form 328) on October 25, 1993. Its certification became effective on November 24, 1993.

[2] Letters from Lisa M. Higginbotham to Wesley R. Heppler, Attorney for TCI TKR of Houston, Inc., and Rhoda S. Andrews, Franchise Manager, City of Houston (August 9, 1994), and Timothy Austin, Senior Assistant City Attorney, City of Houston (August 26, 1994).

[3] 47 U.S.C. § 543(a)(4).

[4] w P37IXP 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if the system in question serves fewer than 30 percent of the households in the franchise area. 47 C.F.R. §§ 76.905(a) and (b)(1).

[9] *See* Response of TCI Cablevision of Dallas, Exhibit 2.

[10] TCI contends that even if "free" accounts and municipal accounts were included in its subscriber count, its penetration rate would still be only 28%. Petition for Reconsideration of Certification, December 17, 1993, 3 n.9.

[11] Declaration of Garry Pomonis, Business Manager, dated December 15, 1993.

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R § 76.911(b)(1).

ment plan."[14] We find this argument unpersuasive. Typically, a cable operator provides cable service in consideration for fees paid. In providing cable service to employees for no fee, TCI is merely providing cable service in consideration for services rendered by its employees. The fact that TCI chooses to provide cable services to its employees in exchange for services rendered instead of charging a fee (as it does for other customers receiving its cable service) is immaterial. Accordingly, these subscribers should have been included for purposes of determining the presence of effective competition.

5. Next, we find that TCI inappropriately relied upon "housing unit" data, rather than "household" data in calculating its penetration level. TCI argues that a "housing unit" test should be used for purposes of determining effective competition. We disagree. As the Commission noted previously, the term "household" was defined for purposes of the 1990 Census as "all the persons who occupy a housing unit."[15] Thus, "households" reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau as including both occupied and vacant units. As the Commission stated recently, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 census that would include vacant units or even partial-year vacant units."[16] In light of this, we find that TCI's effective competition claim is inappropriately based on the number of housing units within its franchise area. Accordingly, we deny its petition.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by TCI TKR of Houston, Inc. challenging the certification of the City of Houston, Texas to regulate TCI's basic cable rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that TCI shall file the required rate justifications on the applicable forms with the City within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the City that it is regulating TCI's basic cable rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *See* Webster's Ninth New Collegiate Dictionary at 1176 (1989).

[15] *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order")* (citing the Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8).

[16] *See Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Pentecostal Revival Association, Inc. against Cablevision Industries of Middle Florida, Inc. CSR- 4307-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1994; Released: January 4, 1995

By the Cable Services Bureau:

1. On August 19, 1994, Pentecostal Revival Association, Inc. ("PRA" or "station"), licensee of low power television station W49AW (Channel 41), Palatka, Florida, filed a complaint against Cablevision Industries of Middle Florida, Inc. ("CVI"), an operator of a cable system serving Palatka, Florida. PRA requests that the Commission require CVI to commence carriage of W49AW. CVI filed an opposition to this complaint on October 6, 1994, to which PRA replied on October 17, 1994. CVI then filed a response to the PRA's reply on November 4, 1994 and PRA filed a rebuttal to that response on November 18, 1994.[1]

2. In support of its petition, PRA argues that W49AW meets all the qualifications under the Commission's LPTV signal carriage rules. PRA states that W49AW: 1) is the only television station in Putnam County; 2) delivers a good quality signal to the cable headend which is only two miles away from the station's 360' transmitting tower; 3) is located in a county which is not part of the top 160 metropolitan statistical areas; 4) is located in Palatka Florida, a community with a population less than 11,000; and 5) fulfills its broadcast licensee obligations vis-a-vis minimum hours of operation, children's programming, equal employment opportunity and locally-originated programming.

3. In its opposition, CVI states that the Commission should deny W49AW's must carry request on substantive and procedural grounds. First, CVI argues that PRA's complaint should be dismissed because it was filed after the applicable 60 day statute of limitations had expired. The cable operator maintains that PRA's complaint was filed on August 16, 1994, more than one year after its Palatka cable system general manager informed the station by letter that its carriage request could not be honored.[2] CVI then asserts that the record submitted by PRA is devoid of any evidence that W49AW satisfies any of the mandatory LPTV criteria for carriage; specifically, CVI contends that the station does not demonstrate that it addresses local news and informational needs not being adequately served by full power television stations. Finally, CVI argues that the petition should be dismissed because PRA did not include a certificate of service along with its filing nor did it serve a copy of the complaint on the requisite franchising authority.[3]

4. PRA emphasizes in its reply that it did not request carriage in the summer of 1993 and that CVI has misinterpreted a letter the station sent on June 21, 1993, as a signal carriage request rather than a letter asking about availability and rates for leased access channels on the cable system.[4] PRA argues that CVI's July 13, 1993, response to its initial letter recognizes that the station was concerned about leased access channel rates and not mandatory carriage. The station also asserts that it recently asked the Commission for advice concerning the metropolitan statistical area criterion -- only after it found out that Palatka and Putnam County were not within the top 160 MSAs did it move forward and file its must carry complaint in August of 1994. Finally, PRA rebuts CVI's contention that it does not serve the local news and informational needs of the Putnam County Community by providing detailed data on the kind of programming it airs on a weekly basis.

5. In its response, CVI faults the station's analysis of its June 21, 1993 letter stating that W49AW, in its reply, ignored key language that exposes the communication as a request for carriage. CVI then focuses on the wording of PRA's June 21, 1994, correspondence which includes the phrase "I am asking once more for your cooperation in providing a cable channel for assignment to W49AW."[5] CVI infers that the station, in this letter, has admitted to

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[1] While these additional filings are clearly outside the Commission's official pleading cycle, we will accept them out of our concern for a complete record. *See* 47 C.F.R. §76.7 and note ("Each party filing a petition, comments, opposition or other pleading pursuant §76.7 is responsible for the continuing accuracy and completeness of all information in such document.") Both parties justify their additional responses by stating that they are necessary to correct factual inaccuracies in each other's pleadings.

[2] In a letter dated July 13, 1993, CVI's Palatka system General Manager conveyed the following information to PRA: "I am in receipt of your request to provide channel space for the Gospel Vision television station of CVI [sic] cable system in Palatka, Florida. Currently, we do not have the ability to add any more channels to our line-up in the Palatka system due to technical capacity level. Further, the total number of programming hours per day on the Gospel Vision would not provide sufficient use of a separate basic cable channel on the cable system." *See* CVI opposition at Exhibit 3.

[3] While CVI suggests the station could possibly amend its complaint to include a certificate of service, it states that such an action on the station's part would be pointless since the complaint would still be considered late filed.

[4] In a letter dated June 21, 1993, PRA made the following request to CVI: "As the first and only broadcast TV station serving the Putnam County Community, I hope that you will make possible a channel on your cable system so that we may reach the many in the community who do not have the pleasure of antennas to pick up regular broadcast stations. If you are not willing to put us on the air, please give me a quote on how much you will lease us a channel for. As I understand the current laws, you should make available 10% of your 36 channels for lease." *See* CVI opposition at Exhibit 2; PRA reply at Exhibit 1.

[5] *See* CVI response at Exhibit A.

asking for carriage before, notably in June of 1993. CVI then reargues the point that the station has not made a sufficient showing that it is qualified for carriage.

6. In its rebuttal to CVI's response, PRA explains that it first requested carriage in December 1991 when it first went on-the-air and that the phrase "once again" is in reference to this request. The station then argues that since its original request was made before the 1992 Cable Act was implemented, it has no bearing on the present complaint. PRA then reiterates that its June 21, 1993, letter to CVI must be considered a leased access request and not a signal carriage request because, at the time, it did not know whether it qualified for carriage under our rules. The station then reasserts that it is a qualified low power television station and criticizes CVI for failing to explain which factor the station does not or can not meet.

7. We are persuaded by the arguments raised by CVI in its filings. We find the language of PRA's June 21, 1993 letter to CVI to be a request for carriage. The phrase ". . . make possible a channel on your cable system so that we may reach the many in your community who do not have the pleasure of antennas . . ." can be reasonably interpreted as an informal signal carriage request. This interpretation is reinforced by the wording found in PRA's June 21, 1994 communication to CVI which "states ". . . I am asking once more for your cooperation in providing a cable channel for assignment to W49AW." We agree with CVI that this phrase "presupposes a prior request", one that took place more than a year before the complaint was filed.[6] We believe that a television station, like W49AW, need not employ the phrase "must carry" in every instance to communicate its desire for carriage to a cable operator.

8. Our rules setting forth must carry complaint procedures are quite clear. "No must carry complaint filed pursuant to §76.61 will be accepted by the Commission if filed more than sixty (60) days after the . . . denial by a cable television system operator of a request for carriage . . . ."[7] W49AW's complaint was filed on August 19, 1994, more than 13 months after CVI formally denied the station's carriage request on July 13, 1993. Moreover, we also find merit in CVI's argument that the station did not adhere to our rules because it did not provide a certificate of service along with its petition and it neglected to serve a copy of the complaint on the local franchising authority. Again our rules are straightforward in this matter. "The petition for special relief or must-carry complaint may be submitted informally, by letter, but shall be accompanied by a certificate of service on any cable television system operator, franchising authority, station licensee, permittee, or applicant, or any other interested person who may be directly affected if the relief requested is granted."[8] Because of these errors in law, W49AW's complaint must be dismissed.[9]

9. Accordingly, IT IS ORDERED, that the petition (CSR-4307-M) filed August 19, 1993, by Pentecostal Revival Association, Inc. IS DISMISSED as incomplete and untimely filed.

10. These actions are taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

[6] In its rebuttal to CVI's response, PRA argues that it requested carriage in 1991 yet it offers no proof to support its contention.
[7] 47 C.F.R. §76.7(c)(4)(iii).
[8] 47 C.F.R. §76.7(b).
[9] Because we resolve the case on these grounds, we need not reach the issue of whether the station meets all the necessary qualifications for carriage.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of	CSR-4179-M
John Wiegand against	CA0925
Post Newsweek Pacifica	
Cable TV, Inc.	

Request for Enforcement

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1994; Released: January 4, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On December 10, 1993, John P. Wiegand filed a "Complaint" against Post-Newsweek Pacific Cable Television TV, Inc. ("Post"), operator of a cable system serving Burlingame, California. Post filed an "Opposition to Complaint" on February 2, 1994, and a supplement to it on February 9, 1994.

SUMMARY OF PLEADINGS

2. In his complaint, Mr. Wiegand alleges various violations of the Commission's rules committed by Post-Newsweek Pacific Cable TV, Inc (Post). In this proceeding, we limit our inquiry to alleged violations of the Commission's mandatory carriage rules.[1] Mr. Wiegand contends that Post deleted station KMTP-TV (channel 32, Ind.) San Francisco, California on December 15, 1992, in violation of Section 5(c) of the 1992 Cable Act,[2] and to the injury of Post's subscribers who were deprived of its educational and informational programming until Post restored its carriage about June 2, 1993. Additionally, Mr. Wiegand asserts that Post failed to commence carriage of Stations KPST-TV (Ind., Channel 66), Vallejo, California, and KFCB (Ind., Channel 42), Concord, California, thereby violating Section 4 of the 1992 Cable Act and depriving its subscribers of access to these two stations' programming.

3. In response, Post asks that the Commission dismiss Mr. Wiegand's complaint because under the 1992 Cable Act and the Commission's rules subscribers do not have standing to file complaints alleging violations of the Commission's signal carriage rules. In the alternative, Post argues that Mr. Wiegard's contentions are wrong in each of the areas he raises. Post states that it carried KMPT-TV when its prior call-sign was KQEC, but that the station changed its ownership, format, and call-sign on August 31, 1991, after which its signal became sporadic, and it often went dark with no prior notice. Therefore, Post discontinued carriage of the station in December 1992, but resumed its carriage on June 2, 1993, when KMPT-TV began broadcasting again on a regular schedule. With respect to the other two stations, Post again argues that Mr. Wiegand lacks standing to raise the issue for the reasons discussed previously, and that both KPST-TV and KFCB were notified by letter dated April 28, 1993, that they lacked the requisite signal quality to qualify as must-carry stations, and that their carriage could cause the system increased copyright liability. Since neither station has thus far proffered any indemnification or improved its signal quality, neither is currently entitled to mandatory carriage, according to Post. In this regard, Post notes that Mr. Wiegand was apparently unaware of the above correspondence between itself and the subject stations. Post asserts that this is why the 1992 Cable Act and the Commission's rules do not give standing to subscribers to file signal carriage complaints, but rather only the station who would be fully aware of the facts.

DISCUSSION

4. Neither the 1992 Cable Act nor our rules give subscribers standing to file complaints before this Commission alleging violations of our signal carriage rules. Consequently we must dismiss the complaint filed by Mr. Wiegand with regard to Post-Newsweek Pacific cable TV, Inc.'s failure to carry Stations KMTP-TV, KPST-TV, and KFCB.

ORDERING CLAUSES

5. In view of the foregoing, we find that grant of Mr. Wiegand's complaint is not in the public interest.

6. Accordingly, the "Complaint" (CSR-41790-M) filed December 10, 1993, by John Wiegand IS DISMISSED, pursuant to Section 615(j)(3) of the Communications Act of 1934, as amended (47 U.S.C. 535). This action is taken by the Cable Services Bureau, pursuant to Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] The other alleged violations of the Commission's rules will be the subject of a separate proceeding.

[2] Pub. L. 102-385, 105 Stat. 1460 (1992), codified at 47 U.S.C. §§ 521-559.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DIRECTSAT CORPORATION — File No. DBS-88-01/88-02/94-08TCP/M

and

ECHOSTAR COMMUNICATIONS CORPORATION

For Commission Consent to
Transfer of Control of
Direct Broadcast Satellite
Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1994; Released: January 4, 1995

By the Commission:

1. Directsat Corporation ("Directsat") holds a Direct Broadcast Satellite ("DBS") construction permit under which it is authorized to construct satellites to provide eleven channels of eastern half-CONUS or full-CONUS[1] DBS service on even-numbered channels 2-20 at orbital position 119°W and on channel 24 at orbital position 110°W, and eleven channels of western half-CONUS service on odd-numbered channels 1-21 at orbital position 175°W, on the condition, *inter alia*, that its authorization for full-CONUS service may be modified or rescinded if subsequent technical studies indicate that such operation would violate the interference parameters of international treaties or agreements. *Directsat Corporation*, 8 FCC Rcd 7962 (1993).[2]

2. Now under consideration is the above-captioned application filed on April 7, 1994, in which Directsat and EchoStar Communications Corporation ("Echo/Comms") seek Commission consent to a transfer of control of Directsat from SSE Telecom, Inc. ("Telecom") to Echo/Comms. Echo/Comms is already the 100% owner of EchoStar Satellite Corporation ("Echo/Sat"), which holds a DBS construction permit under which it is authorized to construct satellites to provide eleven channels of eastern half-CONUS or full-CONUS DBS service on odd-numbered channels 1-21 at orbital position 119°W, and eleven channels of western half-CONUS DBS service from an as yet unspecified western orbital position, subject to certain non-interference conditions. *EchoStar Satellite Corporation*, 7 FCC Rcd 1765 (1992). Under the organizational structure proposed in the instant application for Commission consent to transfer of control, DBS permittees Directsat and Echo/Sat both would be controlled by Echo/Comms, and Telecom would become a minority stockholder in Echo/Comms, the value of which interest, the applicants represent, would exceed the out-of-pocket expenses incurred in the prosecution of the Directsat application. DBS permittee Dominion Video Satellite, Inc. ("Dominion") has filed informal comments in this proceeding.

3. This application presents two fundamental issues concerning our regulatory policies for the DBS service. First, although there exists no rule barring the for-profit sale of a DBS construction permit, this is the first time that the issue has been presented to the Commission in the practical context of a transfer application. Given the concern we traditionally have expressed over the adverse impact of permitting for-profit sales of unbuilt construction permits in other services, it is appropriate that we here evaluate the propriety, under the public interest standard of Section 310(d), of such sales in the DBS service. Second, this application also represents the first instance in which competing DBS conditional permittees propose to combine their interests. While the Commission expressly declined to impose general multiple ownership restrictions for DBS permittees and licensees when it initially established rules for the DBS service in 1982,[3] it is appropriate to consider whether the particular ownership combination proposed here raises any public interest concerns in light of current market conditions.

4. *Transfer of Control/Assignment of Construction Permit for an Unbuilt DBS Facility*. The for-profit sale of a construction permit for an unbuilt radio or television broadcast station is prohibited by the Commission's rules, specifically 47 C.F.R. §73.3597. Implicit in the filing of a construction permit application is the intent to construct the station and commence service. This for-profit sale restriction seeks not only to maintain the integrity of the Commission's application process, but also to promote the expeditious inauguration of new service. *E.g., Assignment and Transfer of Construction Permits*, 16 FCC 2d 789 (1969). While we find that the reasons underlying the for-profit sale prohibition serve important Commission objectives, we believe that a similar restraint applied to the DBS service is unnecessary and undesirable. In the DBS service, all construction permits are conditioned on the permittee's due diligence in making progress towards the

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[1] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[2] In *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), the Commission cancelled DBS permittee Dominion Video Satellite's reservation of channels at orbital position 119°W. Dominion has filed a petition for reconsideration of that action. Accordingly, Directsat's assignment of channels at 119°W was and is conditioned on the outcome of the Dominion petition for reconsideration proceeding. *Directsat Corporation*, *supra* 8 FCC Rcd at 7964 fn.5, 7965.

[3] At that time, the Commission determined that the public interest would best be served by affording DBS permittees the maximum flexibility in order to facilitate the introduction of a new service which was untried and unproven both technically and financially. *Direct Broadcast Satellites (Report and Order in General Docket No. 80-603)*, 90 FCC 2d 676, 706-08 (1982) (*"DBS R&O"*). Only minimum regulatory requirements were imposed; and further regulatory restraints were to be established, stated the Commission, only if experience showed them to be necessary. *Id.* 90 FCC at 708, 713.

initiation of DBS service. Within one year of the grant of the permit, the DBS permittee must begin actual construction or complete contracting for construction of its satellite station. Section 100.19 of the Commission's Rules, 47 C.F.R. §100.19. *Direct Broadcast Satellite Processing Procedures*, 95 FCC 2d 250, 253 (1983). A permittee must demonstrate the existence of a contract that contains no unresolved contingencies which could preclude substantial construction of the satellite and that sets forth regular, specific construction progress milestones and payment schedules in the construction timetable, which indicate the certainty of the plan, the reasonableness of the projected completion date and the permittee's investment or commitment to completion and the inauguration of DBS service. Pursuant to this due diligence requirement, DBS permittees are also required to submit semi-annual reports to the Commission describing the progress they have made in implementing their proposals. We believe that the due diligence and semi-annual reporting requirements have been sufficient to promote progress and to deter permittees from seeking to delay or postpone construction with the expectation that the permit would nevertheless become more valuable and could be sold later at an increased price for profit. Here, Directsat's investment in the development of its DBS system has been substantial and the progress set forth in its semi-annual reports has been steady and consistent with the schedule established in its construction contract. The mere fact that Telecom would now realize a profit from the sale of Directsat's permit does not, standing alone, evidence an intent to speculate in the sale of unbuilt DBS permits to the detriment of the public. On the contrary, the public's interest in the expeditious inauguration and development of the DBS service may well be advanced by this sale. Consolidations of the nature before us may result in certain economies of scale that would ensure a DBS transferee, such as Echo/Comms, a greater likelihood of competing effectively in this emerging service which may ultimately facilitate the introduction of its DBS service to the public. Our minimum regulatory approach to DBS appears to have been successful and operational DBS service is now a reality. Under these circumstances and since we are unaware of any behavior on the part of DBS permittees in general, and Directsat in particular, that would cause us to alter our approach, we believe that the public interest would best be served by allowing this for-profit sale of Directsat's DBS construction permit.

5. *Multiple Ownership*. When the Commission declined to establish any multiple ownership restrictions for the DBS service, it noted that the domestic satellite industry existing at that time consisted of several operators, and that the numerous proposed DBS systems, as well as other alternative video program delivery services, "would provide sufficient competition to prevent monopolistic pricing or other abuses of market power." *DBS R&O*, *supra* 90 FCC 2d at 712. Thus, the Commission determined that "existing antitrust laws... provide adequate protection against possible abuses of market power due to horizontal concentration of control." *Id.* Further, the Commission determined that multiple ownership restrictions were not necessary to assure diversity of sources of programming. *Id.* 90 FCC 2d at 713.

6. The basic conditions which led the Commission to believe that multiple ownership restrictions for the DBS service were not necessary still exist, and will continue to exist if the instant transfer of control application is granted. There would still remain eight separate and independent DBS permittees proposing to provide DBS service to the American public. These proposed DBS operations, plus other video program delivery services, like cable television, "wireless" cable and over-the-air broadcast, will continue to "provide sufficient competition to prevent monopolistic pricing or other abuses of market power", *id.* 90 FCC 2d at 712. Further, if the instant application is granted, Echo/Comms will control DBS permittees which are authorized to construct satellites to provide a total of 22 channels of national DBS service. There are seven other independent DBS permittees proposing at a minimum 8 channels of service, and two of those, Hughes Communications Galaxy, Inc. and Advanced Communications Corporation, are authorized to provide 27 channels of national DBS service apiece. In this regard, Hughes Communications Galaxy and United States Satellite Broadcasting Inc., which proposes to provide 8 channels of service, have recently commenced direct broadcast operations. Accordingly, Echo/Comms' proposed utilization of 22 channels does not raise a significant concern regarding competitiveness and diversity in the emerging DBS marketplace.[4] Moreover, we believe that combining the resources of Directsat and Echo/Sat and the economies of scale that could be realized as a result of aggregating their channel assignments could, as maintained by the applicants, facilitate the introduction of their DBS service to the public. Currently, Directsat and Echo/Sat are each authorized to provide 11 channels of nationwide DBS service. Their respective services will, in fact, be in direct competition with established cable systems offering as many as 100 or more channels, and the two recently operational DBS systems that will provide a total of 35 channels of national DBS service. According to the applicants, a single DBS entity controlling 22 channels of nationwide service would be able to compete more effectively with such cable and DBS operations than would their respective existing 11-channel facilities operating alone.

7. *Dominion's Informal Comments*. In its informal comments, Dominion states that Echo/Comms and Telecom have issued press releases that "mislead the business and financial community" because such press releases do not state that Directsat's assignment of channels at 119°W is conditioned on the outcome of the petition for reconsideration of *Dominion Video Satellite, Inc.*, *supra*. *See* Footnote 2, *supra*. Dominion also asserts that the applicants "are attempting to create... an *ex post facto* environment" (emphasis omitted) for the denial of that petition for reconsideration; and that in making its decision in the petition for reconsideration proceeding as to whether Dominion is entitled to the assignment of channels at 119°W, the Commis-

[4] In this regard, it should also be noted that the existing antitrust laws still provide adequate protection should any undue concentration of control in the DBS industry develop in the future.

sion should not consider the financial liabilities and risks to which Echo/Comms has committed itself in connection with the instant transfer application.

8. The Commission's decision on Dominion's petition for reconsideration of the cancellation of its reservation of channels at 119°W will be made on the basis of the arguments contained in the pleadings in that proceeding, the facts of that case, and the Commission's established rules and policies. The instant transfer of control proposal and its financial consequences are not at issue in that proceeding, and are not relevant to that proceeding. Further, in their application the parties state that the instant transfer of control proposal "is not contingent upon Directsat maintaining its channel assignments at any particular orbital location." Accordingly, Dominion's stated concerns about the impact of this proposed transfer of control on its petition for reconsideration are without merit, and do not require any Commission action. With regard to the allegedly "mislead[ing]" press releases, the conditional nature of Directsat's assignment of channels at orbital position 119°W is clearly part of the public record. *See Directsat Corporation, supra* 8 FCC Rcd at 7964 fn.5, 7965. This Commission has no rules or policies which regulate the content of press releases issued by permittees, and Dominion has not identified any harm, either to itself or to the public interest, arising out of the content of the press releases about which it complains. In view of the foregoing, the informal comments submitted by Dominion do not raise any substantial or material questions of fact as to whether the grant of the instant transfer of control application would serve the public interest, convenience or necessity, and Dominion's informal comments therefore will be denied.

9. In view of the foregoing, and having found the applicants are fully qualified, we conclude that grant of the instant application for Commission consent to transfer of control of Directsat to Echo/Comms would serve the public interest.

10. Accordingly, IT IS ORDERED That the application for transfer of control of DBS permittee Directsat Corporation, from SSE Telecom, Inc. to EchoStar Communications Corporation, File No. DBS-88-01/88-02/94-08TCP/M, IS GRANTED.

11. IT IS FURTHER ORDERED That the informal comments filed by Dominion Video Satellite, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MultiVision Cable TV LOI-93-15
Prince George's County, Maryland

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In letters to the Commission dated September 20, 1993 and October 26, 1993, the Prince George's County Cable Television Commission alleged violations by MultiVision Cable TV ("MultiVision") of Commission regulations governing the provision of cable television service. In response to these complaints, the Commission issued Letter of Inquiry 93-15 ("LOI") to MultiVision on November 17, 1993.[1] The LOI asked MultiVision to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] MultiVision responded to our LOI on December 17, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scru-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to David A. Wilson, Vice President and General Manager, MultiVision Cable TV, LOI-93-15 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving MultiVision. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order MultiVision to make refunds to subscribers in regard to MultiVision's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning negative option billing, compliance with the FCC rate freeze, service call charges, premium service duplication fees, disconnect basic service fees, scrambling of signals on the cable programming service tier and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[4] Pub. L. No. 102-385 § 2(b)(4), 106 Stat. 1460, (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623(b)(7)(A) (ii-iii), 47 U.S.C. § 543(b)(7)(A) (ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

tinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, MultiVision's services included a 28-channel basic tier, called Limited Service, for $3.00 per month and a 32-channel cable programming service tier, called Satellite Tier, for $22.95 per month. Both tiers of service could be purchased together as a package, called Standard Service, for $25.95 per month.

7. The following chart summarizes MultiVision's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Service	28	$ 3.00
2. Satellite Tier	32	$22.95
TOTAL (Standard Service)	60	$25.95

8. Beginning September 1, 1993, the date our rate regulations became effective, MultiVision restructured its service offerings. Multivision's restructured service offerings included a 30-channel basic service tier for $11.55 per month and a 27-channel cable programming service tier for $10.40 per month.[14] MultiVision states that it also began offering four channels on an individual and package basis. The four channels were HTS, TNT, WTBS and WWOR. Two of these channels, WTBS and WWOR, were moved from the Limited Service tier and two channels, HTS and TNT, were moved from the Satellite Tier.

9. MultiVision states that each of the four channels could be purchased individually for the following prices: HTS-$2.95; TNT-$2.50; WTBS-$2.00; WWOR-$2.00. All four channels could be purchased as a package, called the MultiVision Variety Package, for $3.61. In addition, on October 1, 1993, ESPN2 was added to the system and was not previously available. Specifically, MultiVision states that ESPN2 was made available individually for $0.50 or as part of the MultiVision Variety Package, at no additional charge, for $3.61.

10. The following chart summarizes MultiVision's service tier options as of the date of its response to our LOI:

Offering	Channels	Price
1. Basic Service	30	$11.55
2. Cable Programming Service	28	$10.40
3. MultiVision Variety Package	5	$ 3.61
TOTAL	63	$25.56 (if purchased package)

11. MultiVision indicates that customers who had previously received the Standard Service (Limited Service plus Satellite Tier) were automatically subscribed to the MultiVision Variety Package on September 1, 1993. MultiVision states that customers who had previously received only the Limited Service, which included WTBS and WWOR but not HTS and TNT, did not automatically receive any of these four channels as of September 1, 1993.

12. MultiVision argues, *inter alia*, that it began offering its services individually and through its package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise choice. MultiVision indicates that, on December 15, 1993, of 39,577 basic service tier subscribers, 37,790 subscribers received the MultiVision Variety Package. According to MultiVision, the following numbers of subscribers received channels on an individual basis: 13 subscribers received HTS; 13 subscribers received TNT; 10 subscribers received WTBS; 1 subscriber received WWOR; and 4 subscribers received ESPN2. Based on these figures, if each subscription to an individual channel represents a consumer, less than one percent of MultiVision's customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice". This analyzes the facts most favorably to MultiVision because fewer than 41 customers may have subscribed to individual channels.

IV. DISCUSSION

13. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering." An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether MultiVision's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

14. MultiVision's restructuring, effective September 1, 1993, involved its movement of two channels (WTBS and WWOR) from its 28-channel Limited Service tier and two channels (HTS and TNT) from its 32-channel Satellite Tier to create the MultiVision Variety Package that it alleges is not rate-regulated. MultiVision removed four channels from rate-regulated tiers and added a new channel, ESPN2,

[11] H.R. Rep. No. 628 at 79.
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] On December 1, 1993, MultiVision added a channel to the cable programming service tier, thereby increasing the total number of channels available on that tier from 27 to 28.
[15] *Rate Order* ¶ 451.
[16] *Id.* at ¶ 453.

to create a five-channel package. In so doing, MultiVision avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if MultiVision had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the two basic tier channels and the two cable programming service tier channels at issue continued to receive them after restructuring. There appears to be no sufficient justification for MultiVision's restructuring other than to avoid rate regulation.

15. Other factors corroborate our view that MultiVision's restructuring may have had the effect of avoiding rate regulation. First, it offered the MultiVision Variety Package on the eve of regulation. Second, it automatically subscribed its Standard Service customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that MultiVision's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if MultiVision's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then MultiVision would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that MultiVision and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[20]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the five services, because subscribers may purchase four of the five channels for $2.00 to $2.95 each and one channel for $0.50 or the five-channel package for $3.61. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of MultiVision's submission reveal that over 99 percent of the subscribers in Prince George's County did not choose to subscribe to individual a la carte channels. Although it appears that only 1,787 of MultiVision's 39,577 subscribers chose not to purchase the a la carte package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[21] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that MultiVision's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (80 percent) was removed from a regulated tier, the absolute number (four) was small.[23] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to MultiVision that its restructuring was not a permissible a la carte package.

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[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether MultiVision evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

[19] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See* ¶ ¶ 14-15, *supra*.

[22] *Second Reconsideration Order* ¶ 196.

[23] *Id.*

20. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation.[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that MultiVision's restructuring was not a permissible a la carte package.

21. For that reason, we do not think that it would be equitable to subject MultiVision to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, MultiVision attempted to treat only five channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances unclear, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning itinto an a la carte package."[27]

22. We will not require MultiVision to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[28] Instead, on a prospective basis, we will consider MultiVision's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because MultiVision's five-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject MultiVision or its Prince George's County customers to the confusion and transaction costs that would result if we required MultiVision to retier.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Multivision's package as it existed on November 17, 1993, may be treated as a new product tier under our *Going Forward Order*.

24. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[24] *See Going Forward Order* at ¶ 40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[26] *Rate Order*, 8 FCC Rcd 5837 n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding MultiVision from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable — LOI-93-16
Everett, MA
Winthrop, MA
Somerville, MA

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission dated September 14, 1994, counsel for the City of Everett, Town of Winthrop and City of Somerville, MA alleged violations by Time Warner Cable ("Time Warner") of Commission regulations governing the provision of cable television service.[1] In response to this complaint, the Commission issued Letter of Inquiry 93-16 ("LOI") to Time Warner on December 13, 1993.[2] The LOI asked Time Warner to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[3] Time Warner responded to our LOI on January 11, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[4] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[5]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[6] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[7] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[8] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[9] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[10] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[11] The 1992 Cable Act's legislative history states that the Commission should scru-

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[1] The Commission also received letters from the City of Everett, Town of Winthrop, and City of Somerville, MA, alleging violations by Time Warner of Commission regulations governing the provision of cable television service.

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Terry O' Connell, President, Time Warner Cable, LOI-93-16 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Time Warner. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Time Warner to make refunds to subscribers in regard to Time Warner's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[3] The LOI also requested information concerning subscriber bill itemization, negative option billing and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993) ; *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[4] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[5] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[6] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[7] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[8] *Id.*

[9] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[10] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[11] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

tinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[12] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[13]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[14] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Time Warner's services included an 18 channel Basic Service tier for $9.03 per month, a 26 channel cable programming service tier called the Standard tier, for $12.23 per month, and an additional 3 channel cable programming service tier called Expanded Tier, for $1.77 per month. In addition, the Basic Service and Standard Tier could be purchased together as Standard Service, for $21.26 per month:[15]

Offering	Channels	Price
1. Basic Service	18	$ 9.03
2. Standard Tier	26	$12.23
(Standard Service-Basic Service and Standard Tier)	44	$21.26
3. Expanded Tier	3	$ 1.77
TOTAL	47	$23.03

7. On September 1, 1993, the date our rate regulations became effective, Time Warner eliminated the Expanded Tier, which consisted of three channels, ESPN, CNN and Lifetime, by adding the programming in that tier to its new Standard Tier. It states that the former Expanded Tier customers remained as customers to Basic Service. Time Warner changed its Basic Service rate to $9.99 and its Standard Tier rate to $12.66. It notes that Basic Service and Standard Tier could be purchased together as Standard Service, for $22.65 per month.

8. In addition, effective October 6, 1993, Time Warner moved two channels, American Movie Classics (AMC) and the Discovery Channel (Discovery) from the Standard Tier and one channel, WTBS from the Basic Service tier, and states that it offered the channels to its subscribers on an individual or package basis.[16] Time Warner states that these channels could be purchased individually for $.50 each or as a package for $1.00. In addition, it states that customers subscribing to Standard Service continued to receive the package of individual a la carte channels. Time Warner's restructuring allowed customers to receive 47 channels at a total price of $23.65 per month. The following chart summarizes Time Warner's service tier options as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Basic Service	18	$ 9.99
2. Standard Tier	26	$12.66
(Standard Service-Basic Service and Standard Tier)	44	$22.65
3. Package	3	$ 1.00 or $ .50 per channel
TOTAL	47	$23.65 (if purchased package)

9. Time Warner argues, *inter alia*, that it began offering its Expanded Tier services individually in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers exercised that choice. Time Warner's response provides a breakdown of its subscribers who chose the package of individual channels. For the City of Everett, of 10,467 total subscribers, 9,829 or 94 percent, subscribe to the a la carte package; for the Town of Winthrop, of 6,060 total subscribers, 5,513 or 91 percent, subscribe to the a la carte package; and for the City of Somerville, of 18,022 total subscribers, 16,518 or 92 percent subscribe to the a la carte package. It appears from Time Warner's response that in each of these communities, none of its customers subscribe to the individual a la carte channels.

IV. DISCUSSION

10. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[18] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[19] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[20] First, we examine whether Time Warner's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

11. Time Warner's restructuring involved elimination of its Expanded tier and moving of 3 channels (WTBS, AMC and Discovery) from its Standard Service to create the three-channel package that it alleges is not rate-regulated. Thus, Time Warner removed channels from an otherwise rate-regulated tier to create a new package of channels. In

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[12] H.R. Rep. No. 628 at 79.

[13] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[14] *Rate Order* ¶ 451.

[15] Time Warner's Response indicates that the rates in each of the three cities at issue are identical. However, the Exhibits submitted therewith reflect different rates in each city. These facts reflect the information in the Response rather than the Exhibits.

[16] Time Warner states that all 3 channels came from its Standard Service which is a combination of its Basic Service and its Standard Tier.

[17] This order does not evaluate Time Warner's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[18] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[19] *Rate Order* ¶ 451.

[20] *Id.* at ¶ 453.

so doing, Time Warner avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Time Warner had not restructured at the time our rate regulations became effective, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993. Moreover, customers that were receiving the Standard Service continued to receive the three channels at issue after the restructuring, and there appears to be no sufficient justification for Time Warner's restructuring other than to avoid rate regulation.

12. Other factors corroborate our view that Time Warner's restructuring may have had the effect of avoiding rate regulation. First, it offered this package shortly after our regulations became effective. Second, it automatically subscribed its customers to the offerings that previously had been part of its Standard Service. In light of these facts, it appears that Time Warner's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Time Warner's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Time Warner would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[21]

13. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[22] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[23] This is not the type of offering that Time Warner and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

14. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with arealistic service choice."[24]

15. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase each channel for $ .50 or the three-channel package for $1.00. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Time Warner's submission reveal that 100 percent of the subscribers in Everett, Winthrop and Somerville did not choose to subscribe to individual a la carte channels. Although only 6 percent of Time Warner's subscribers in Everett, 9 percent of its subscribers in Winthrop, and 8 percent of its subscribers in Somerville chose not to purchase the a la carte package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[25] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

16. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[26] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Time Warner's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from a regulated tier, the absolute number (three) was small.[27] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Time Warner that its restructuring was not a permissible a la carte package.

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[21] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Time Warner evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[22] *Rate Order* ¶ 329.

[23] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[24] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[25] *See* ¶ ¶ 11-12, *supra*.

[26] *Second Reconsideration Order* ¶ 196.

[27] *Id.*

17. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order* 's two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation.[28] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Time Warner's restructuring was not a permissible a la carte package.

18. For that reason, we do not think that it would be equitable to subject Time Warner to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[29] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Time Warner attempted to treat only three channels as an unregulated collective offering of a la carte channels. In addition, although as part of its restructuring Time Warner completely eliminated its Expanded Service tier by adding the Expanded Tier programming to its new Standard Tier, it still maintained a cable programming service tier with a substantial number of channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were, in many instances, unclear, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[30] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[31]

19. We will not require Time Warner to restructure its tiers so as to return the channels offered in the a la carte package to the basic tier,[32] instead, on a prospective basis, we will consider Time Warner's collective offering of a la carte channels a new product tier[33] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Time Warner's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Time Warner or its Everett, Winthrop and Somerville customers to the confusion and transaction costs that would result if we required Time Warner to retier.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that Time Warner's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

21. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[28] *See Going Forward Order* ¶ 40.

[29] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[30] *Rate Order*, 8 FCC Rcd 5837 n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[31] *Second Reconsideration Order* ¶ 196.

[32] We are not precluding Time Warner from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[33] *Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-18
Muncie, Indiana

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a submission received by the Commission, dated September 22, 1993, the City of Muncie, Indiana, alleged violations by Century Cable TV of Muncie, Indiana ("Century"), of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-18 ("LOI") to Century on December 13, 1993.[1] The LOI asked Century to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] Century responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Century Cable TV of Muncie, Indiana, LOI-93-18 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Century to make refunds to subscribers in regard to Century's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Century's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Century's services included a 16 channel basic tier, called Basic Service, for $13.95 per month, a 13 channel cable programming service tier, called the Silver tier, for $6.50 per month, and an additional 5 channel cable programming service tier, called the Gold tier, for $2.00 per month. In order to receive the Gold tier, subscribers were required to purchase both the basic tier and the Silver tier.

7. The following chart summarizes Century's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	16	$13.95
2. Silver tier	13	$ 6.50
3. Gold tier	5	$ 2.00
Total	34	$22.45

8. Beginning September 1, 1993, the date our rate regulations became effective, Century restructured its service offerings. Century's restructured service offerings included a 30 channel basic tier, called Basic Service, for $20.64 per month and it states that four channels were offered on an individual basis. The four channels were The Discovery Channel, Turner Network Television (TNT), The Nashville Network (TNN), and Cable News Network (CNN). TNT, TNN and CNN were originally in Century's Gold tier and The Discovery Channel was originally in Century's Silver tier.

9. Century states that the four a la carte channels could be purchased individually for $1.35 per month. All four channels could be purchased as a package, called Century Select, for $4.50 per month.

10. The following chart summarizes Century's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Service	30	$20.64
2. Century Select	27	$ 4.50
Total	34	$25.14

11. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. As of the date of its response, Century states that 5,920 subscriptions to individual channels were made, while 19,950 subscribers took the Century Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Century's restructuring effective September 1, 1993, involved its movement of three channels (TNT, TNN and CNN) from its 5 channel Gold tier and one channel (The Discovery Channel) from its 13 channel Silver tier to create the four-channel package that it alleges is not rate-regulated. Thus, Century removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the three Gold tier channels and the one Silver tier channel at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Century's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Century's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Century automatically subscribed its customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears that Century's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Century's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

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[11] H.R. Rep. No. 628 at 79.

[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

[14] This Order does not evaluate Century's rates for its Basic Service. These rates are subject to review by the local franchising authority in a separate proceeding.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on*

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Century and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase the four channels for $1.35 each or the four-channel package for $4.50. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Century's submission reveals that of the 25,870 subscribers who requested either individual channels or the Century Select package, 5,920 are reported to have subscribed to individual channels. Based on these figures, assuming a best case scenario for Century, about 23 percent of subscribers to these channels elected to subscribe to individual channels. This analyzes the facts most favorably to Century because fewer than 5,920 may have subscribed to individual channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low percentage of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Century's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Century that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Century's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Century to refund liability. This result is distinguishable from the result we reached in *Adelphia*

Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46 . However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* at ¶ 40.

Cable Partners, L.P.,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Century eliminated two cable programming service tiers but moved most of the channels from those tiers into the rate regulated basic tier. Century attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require Century to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider Century's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Century's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Century or its Muncie customers to the confusion and transaction costs that would result if we required Century to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Century from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision LOI-93-19
Mt. Clemens, Michigan

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter to the Commission dated October 20, 1993, the City of Mt. Clemens, Michigan alleged violations by Comcast Cablevision of Mt. Clemens, Michigan ("Comcast") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-19 ("LOI") to Comcast on December 13, 1993.[1] The LOI asked Comcast to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate regulated.[2] Comcast responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to David L. Wells, General Manager, Comcast Cablevision of Mt. Clemens, Michigan, LOI-93-19 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, "Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Comcast's new service repair charge, negative option billing and its compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

"prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Comcast's services included a 16 channel basic tier, called Limited Basic, for $6.95 per month, a five channel cable programming service tier, called Cable Lite Satellite Service, for $8.00 per month and a 20 channel cable programming service tier, called Deluxe Satellite Service, for $10.10 per month. These three tiers of service could be purchased together, called Expanded Basic, for $25.05 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Basic	16	$ 6.95
2. Cable Lite Satellite Service	5	$ 8.00
3. Deluxe Satellite Service	20	$10.10
Total (Expanded Basic)	41	$25.05

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 16 channel basic tier, called Limited Basic, for $8.06 per month and a 27 channel cable programming service tier, called Standard Service, for $13.61 per month. Comcast states that it also began offering four channels on an individual and package basis. The four channels were The Discovery Channel, Turner Network Television ("TNT"), WTBS-Atlanta and WGN-Chicago. WTBS and WGN were originally in Comcast's Limited Basic service tier. The Discovery Channel was in Comcast's Cable Lite Satellite Service tier and TNT was in Comcast's Deluxe Satellite Service tier.

9. Comcast states that The Discovery Channel, WTBS and WGN could be purchased individually for $0.25 per month and TNT could be purchased individually for $0.37 per month. All four channels could be purchased as a package, called Value Pak, for $0.48 per month. The same four channels purchased individually cost subscribers $1.12 per month. If a subscriber purchased Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost $22.15 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Limited Basic	16	$ 8.06
2. Standard Service	27	$13.61
3. Value Pak	4	$ 0.48
Total (Preferred Service)	47	$22.15

11. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pak package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of November 30, 1993, Comcast states that only 14 out of its 3,900 customers in Mt. Clemens chose not to subscribe to Value Pak and that as of this same date none of its customers in Mt. Clemens were receiving individual a la carte channels. We note that this means that only 0.3 percent of Comcast's subscribers in Mt. Clemens chose not to receive Value Pak. Comcast's response and the attached customer bill insert also indicate that Expanded Basic subscribers were automatically subscribed to Value Pak.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate regulated.

13. Comcast's restructuring effective September 1, 1993, involved its movement of two channels (WTBS and WGN) from its 16 channel Limited Basic service tier, one channel (The Discovery Channel) from its five channel Cable Lite Satellite Service tier and one channel (TNT) from its 20 channel Deluxe Satellite Service tier to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators

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[11] H.R. Rep. No. 628 at 79.
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).
[16] *Rate Order* ¶ 451.
[17] *Id.* at ¶ 453.

to reduce their rates. Moreover, the Expanded Basic customers that were previously receiving the four channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Comcast's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Expanded Basic customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services because subscribers may purchase three of the channels for $0.25 and the fourth channel for $0.37 or the four-channel package for $0.48. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Comcast's submission reveals that only 0.3 percent of Comcast's subscribers in Mt. Clemens chose not to subscriber to the Value Pak and none of its customers chose to subscribe to individual a la carte channels. Although only 14 of Comcast's subscribers chose not to purchase the a la carte package, our test does not specify what number would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider Comcast's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Mt. Clemens customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Comcast's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[25] *See Going Forward Order* at ¶40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CableVision of Central Florida — LOI-93-26

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a letter from the Board of County Commissioners, Hernando County, Florida dated October 5, 1993, alleging that Time Warner Entertainment Company, L.P., d/b/a CableVision of Central Florida, in Hernando County, Florida ("Cablevision") violated Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-26 ("LOI") to CableVision on December 13, 1993.[1] The LOI asked CableVision to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] CableVision responded to our LOI on January 11, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Ms. Beth Scarborough, CableVision of Central Florida, LOI-93-26 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving CableVision. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order CableVision to make refunds to subscribers in regard to CableVision's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 1, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. CableVision states that it operates two distinct systems in Hernando County with slightly different service offerings. The two systems are designated as the Brooksville headend system and the West Hernando headend system. Before September 1, 1993, CableVision's services on the Brooksville headend system included a 15 channel basic tier for $9.95 per month, and an 18 channel cable programming service tier, called the Standard tier, for $10.63 per month. Before September 1, 1993, CableVision's services on the West Hernando headend system included a 12 channel basic tier for $9.95 per month and a 20 channel cable programming service tier, called the Standard tier, for $10.63 per month.

7. The following chart summarizes CableVision's service tier offerings prior to September 1, 1993:

Brooksville headend system:

Offering	Channels	Price
1. Basic tier	15	$ 9.95
2. Standard tier	18	$10.63
Total	33	$20.58

West Hernando headend system:

Offering	Channels	Price
1. Basic tier	12	$ 9.95
2. Standard tier	20	$10.63
Total	32	$20.58

8. Beginning September 1, 1993, the date our rate regulations became effective, CableVision restructured its service offerings.[14] CableVision's restructured service offerings on its Brooksville headend system included a 13 channel basic tier for $8.50 per month and a 17 channel cable programming service tier, called the Standard tier, for $11.12 per month. CableVision's restructured service offerings on its West Hernando headend system included an 11 channel basic tier for $7.64 per month and an 18 channel cable programming service tier, called the Standard tier, for $12.50 per month. In addition, CableVision's restructured service offerings on both systems included a three channel a la carte package, consisting of WTBS, WGN, and WOR. All three channels were originally in CableVision's basic tier on both systems.

9. On both systems, CableVision states that WTBS, WGN, and WOR could be purchased individually for $1.50 per month, or all three channels could be purchased as a package for $2.97 per month.

10. The following chart summarizes CableVision's service tier options as of the date of its response to our LOI:[15]

Brooksville headend system:

Offering	Channels	Price
1. Basic tier	13	$ 8.50
2. Standard tier	17	$11.12
3. A la carte package	3	$ 2.97
Total	33	$22.59

West Hernando headend system:

Offering	Channels	Price
1. Basic tier	11	$ 7.64
2. Standard tier	18	$12.50
3. A la carte package	3	$ 2.97
Total	32	$23.11

11. CableVision argues, *inter alia*, that it began offering its services individually and through the a la carte package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, CableVision states that on its Brooksville headend system, 2,844 of its 3,269 subscribers purchased the a la carte package; only 13 subscriptions to individual channels were made at that time. Further, as of the date of its response, Cablevision states that on its West Hernando headend system, 20,541 of its 21,761 subscribers purchased the a la carte package; only 48 subscriptions to individual channels were made at that time. Based on these figures, assuming a best case scenario for CableVision where each subscription to an individual channel represents a consumer, less than 0.4 percent of CableVision's Brooksville headend system customers and less than 0.3 percent of CableVision's West Hernando headend system customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice." This analyzes the facts most favorably to CableVision because fewer than 13 customers on the Brooksville headend system and fewer than 48 customers on the West Hernando system may have subscribed to individual channels.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or

[11] H.R. Rep. No. 628 at 79.
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] CableVision instituted some channel line-up changes on its systems on August 26, 1993 and August 30, 1993. CableVision's rate changes, however, were effective September 1, 1993.
[15] This Order does not evaluate CableVision's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether CableVision's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. CableVision's restructuring effective September 1, 1993, involved its movement of three channels (WTBS, WGN, and WOR) from its 12 and 15 channel basic tiers to create the three-channel package that it alleges is not rate-regulated. Thus, CableVision removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, CableVision avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if CableVision had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the three basic tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for CableVision's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that CableVision's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it apparently automatically subscribed its customers to the offerings that previously had been part of its basic service tiers. In light of these facts, it appears that CableVision's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if CableVision's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then CableVision would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that CableVision and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for each combined package offered on the two systems does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.50 each or the three-channel package for $2.97. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of CableVision's submission reveal that more than 99 percent of the subscribers on the Brooksville headend system and the West Hernando headend system did not choose to subscribe to individual a la carte channels.[23] This fact, together with the other factors present in this case,[24] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

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[17] *Rate Order* ¶ 451.

[18] *Id.* at ¶ 453.

[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether CableVision evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See* ¶ 11, *supra*.

[24] *See, e.g.*, ¶ ¶ 13-14, *supra*.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[25] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that CableVision's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in each system's a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[26] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to CableVision that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[27] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that CableVision's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject CableVision to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[28] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, CableVision attempted to treat only three channels in each system as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[29] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[30]

21. We will not require CableVision to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[31] Instead, on a prospective basis, therefore, we will consider CableVision's collective offering of a la carte channels a new product tier[32] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because CableVision's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject CableVision or its Hernando County customers to the confusion and transaction costs that would result if we required CableVision to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that CableVision's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[25] *Second Reconsideration Order* at ¶ 196.
[26] *Id.*
[27] *See Going Forward Order* at ¶ 40.
[28] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).
[29] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").
[30] *Second Reconsideration Order* ¶ 196.
[31] We are not precluding CableVision from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing "tier.
[32] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision LOI-93-33
Warren, Michigan

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 18, 1993, concerning the reasonableness of the rates charged for cable programming services by Comcast Cablevision of Warren, Michigan ("Comcast"). In response to this complaint, the Commission issued Letter of Inquiry 93-33 ("LOI") to Comcast on December 13, 1993.[1] The LOI asked Comcast to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Comcast responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to David L. Wells, General Manager, Comcast Cablevision of Warren, Michigan, LOI-93-33 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds."

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Comcast's services included a 16 channel basic tier, called Limited Basic, for $6.95 per month, a five channel cable programming service tier, called Cable Lite Satellite Service, for $8.00 per month and a 20 channel cable programming service tier, called Deluxe Satellite Service, for $10.10 per month. These three tiers of service could be purchased together, called Expanded Basic, for $25.05 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Basic	16	$ 6.95
2. Cable Lite Satellite Service	5	$ 8.00
3. Deluxe Satellite Service	20	$10.10
Total (Expanded Basic)	41	$25.05

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 16 channel basic tier, called Limited Basic, for $8.01 per month and a 27 channel cable programming service tier, called Standard Service, for $13.52 per month. Comcast states that it also began offering four channels on an individual and package basis. The four channels were The Discovery Channel, Turner Network Television ("TNT"), WTBS-Atlanta and WGN-Chicago. WTBS and WGN were originally in Comcast's Limited Basic service tier. The Discovery Channel was in Comcast's Cable Lite Satellite Service tier and TNT was in Comcast's Deluxe Satellite Service tier.

9. Comcast states that The Discovery Channel, WTBS and WGN could be purchased individually for $0.25 per month and TNT could be purchased individually for $0.37 per month. All four channels could be purchased as a package, called Value Pak, for $0.49 per month. The same four channels purchased individually cost subscribers $1.12 per month. If a subscriber purchased Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost $22.02 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Limited Basic	16	$ 8.01
2. Standard Service	27	$13.52
3. Value Pak	4	$ 0.49
Total (Preferred Service)	47	$22.02

11. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pak package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of November 30, 1993, Comcast states that only 50 subscribers in Warren had chosen not to receive Value Pak and as of this same date none of its customers were receiving individual a la carte channels. Comcast's response and the attached customer bill insert also indicate that Expanded Basic subscribers were automatically subscribed to Value Pak.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the |Cable| Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Comcast's restructuring effective September 1, 1993, involved its movement of two channels (WTBS and WGN) from its 16 channel Limited Basic service tier, one channel (The Discovery Channel) from its five channel Cable Lite Satellite Service tier and one channel (TNT) from its 20 channel Deluxe Satellite Service tier to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, the Expanded Basic customers that were previously receiving the four channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Comcast's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Expanded Basic customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

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[13] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte chan-

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[20]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services because subscribers may purchase three of the channels for $0.25 and the fourth channel for $0.37 or the four-channel package for $0.49. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Comcast's submission reveals that only 50 of Comcast's subscribers in Warren chose not to subscribe to the Value Pak and none of its customers chose to subscribe to individual a la carte channels. Although only 50 of Comcast's subscribers chose not to purchase the a la carte package, our test does not specify what number would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[21] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[23] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will

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nels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an "evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[22] *Second Reconsideration Order* at ¶ 196.

[23] *Id.*

[24] *See Going Forward Order* at ¶40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

21. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[28] Instead, on a prospective basis, we will consider Comcast's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Warren customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Comcast's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-34
Morgantown, West Virginia

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on November 4, 1993, concerning the reasonableness of the rates charged for cable programming services by Century Cable TV of Morgantown, West Virginia ("Century"). In response to this complaint, the Commission issued Letter of Inquiry 93-34 ("LOI") to Century on December 13, 1993.[1] The LOI asked Century to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Century responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Century Cable TV of Morgantown, West Virginia, LOI-93-34 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Century to make refunds to subscribers in regard to Century's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Century's services included a 14 channel basic tier, called Basic Service, for $12.95 per month, and a 17 channel cable programming service tier, called Super Basic, for $10.25 per month.

7. The following chart summarizes Century's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	14	$12.95
2. Super Basic	17	$10.25
Total	31	$23.20

8. Beginning September 1, 1993, the date our rate regulations became effective, Century restructured its service offerings. Century's restructured service offerings included a 28 channel basic tier, called Basic Service, for $23.50 per month and three channels offered on an individual basis. The three channels were the Discovery Channel, Turner Network Television (TNT), and The Nashville Network (TNN). All three channels were originally in Century's Super Basic tier.

9. The Discovery Channel, TNT, and TNN could be purchased individually for $1.00 per month. All three channels could be purchased as a package, called Century Select, for $2.25 per month.

10. The following chart summarizes Century's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Basic Service	28	$23.50
2. Century Select	3	$ 2.25
Total	31	$25.75

11. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Century states that 474 subscriptions to individual channels were made, while 7,175 subscribers took the Century Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the |Cable| Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Century's restructuring effective September 1, 1993, involved its movement of three channels (The Discovery Channel, TNT, and TNN) from its 17 channel Super Basic tier to create the three-channel package that it alleges is not rate-regulated. Thus, Century removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the three Super Basic tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Century's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Century's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it apparently automatically subscribed its customers to the offerings that previously had been part of its cable programming service tier. In light of these facts, it appears that Century's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Century's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Century and others have provided their subscribers. Specifically,

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[13] This Order does not evaluate Century's rates for its Basic Service. These rates are subject to review by the local franchising authority in a separate proceeding.

[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift pro-

these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with arealistic service choice."[20]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.00 each or the three-channel package for $2.25. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Century's submission reveal that there were only 474 subscriptions to individual Century Select channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that there were only 474 subscriptions to individual Century Select channels, together with the other factors present in this case,[21] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Century's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[23] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it wasclear to Century that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Century's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Century to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Century eliminated a cable programming service tier but moved most of the channels from that tier into the rate regulated basic tier. Century attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

21. We will not require Century to restructure its tiers so as to return the channels offered in the a la carte package

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gramming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See, e.g.*, ¶ ¶ 14-15, *supra*.

[22] *Second Reconsideration Order* at ¶ 196.

[23] *Id.*

[24] *See Going Forward Order* at ¶40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[26] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

to the basic or cable programming service tiers,[28] instead, on a prospective basis, therefore, we will consider Century's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Century's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Century or its Morgantown customers to the confusion and transaction costs that would result if we required Century to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[28] We are not precluding Century from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision LOI-93-35
Flint, Michigan

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 12, 1993, concerning the reasonableness of the rates charged for cable programming services by Comcast Cablevision of Flint, Michigan ("Comcast"). In response to this complaint, the Commission issued Letter of Inquiry 93-35 ("LOI") to Comcast on December 13, 1993.[1] The LOI asked Comcast to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Comcast responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulationsp for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Les Jakobsen, General Manager, Comcast Cablevision of Flint, Michigan, LOI-93-35 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, "Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Comcast's services included a 17 channel basic tier, called Lifeline Service, for $8.95 per month, a four channel cable programming service tier, called Economy Basic (Cable Lite), for $6.05 per month and a 18 channel cable programming service tier, called Satellite Services, for $10.45 per month. These three tiers of service could be purchased together, called Super Basic, for $25.45 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Lifeline Service	17	$ 8.95
2. Economy Basic (Cable Lite)	4	$ 6.05
3. Satellite Services	18	$10.45
Total (Super Basic)	39	$25.45

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 21 channel basic tier, called Limited Basic, for $10.43 per month and a 22 channel cable programming service tier, called Standard Service, for $11.92 per month. Comcast states that it also began offering four channels on an individual and package basis. The four channels were The Discovery Channel, Turner Network Television ("TNT"), WTBS-Atlanta and WGN-Chicago. WTBS and WGN were originally in Comcast's Lifeline Service tier, The Discovery Channel was in Comcast's Economy Basic (Cable Lite) service tier and TNT was in Comcast's Satellite Services tier.

9. Comcast states that The Discovery Channel, WTBS and WGN could be purchased individually for $0.25 per month and TNT could be purchased individually for $0.37 per month. All four channels could be purchased as a package, called Value Pak, for $0.49 per month. The same four channels purchased individually cost subscribers $1.12 per month. If a subscriber purchased Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost $22.84 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Limited Basic	21	$10.43
2. Standard Service	22	$11.92
3. Value Pak	4	$ 0.49
Total (Preferred Service)	47	$22.84

11. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pak package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of December 15, 1993, Comcast states that on a system-wide basis it had 3,432 customers who did not subscribe to Value Pak and as of this same date none of its subscribers were receiving few than all of the a la carte channels. Comcast's response and the attached customer bill insert also indicate that Super Basic customers were automatically subscribed to Value Pak.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Comcast's restructuring effective September 1, 1993, involved its movement of two channels (WTBS and WGN) from its 17 channel Lifeline Service tier, one channel (The Discovery Channel) from its four channel Economy Basic (Cable Lite) service tier and one channel (TNT) from its 18 channel Satellite Services tier to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, the Super Basic customers that were previously receiving the four channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Comcast's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Super Basic customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

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[13] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte chan-

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[20]

17. Under the two-part test that we set forth in the *Rate Order*, Pit is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services because subscribers may purchase three of the channels for $0.25 and the fourth channel for $0.37 or the four-channel package for $0.49. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Comcast's submission reveals that none of its subscribers were taking fewer than all of the a la carte services. Although none of Comcast's subscribers chose to purchase individual a la carte channels, our test does not specify what number would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[21] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[23] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not "an evasion of rate regulation."[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will

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nels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[22] *Second Reconsideration Order* at ¶ 196.

[23] *Id.*

[24] *See Going Forward Order* at ¶40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

21. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[28] Instead, on a prospective basis, we will consider Comcast's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Flint customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Comcast's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-39
Yuma, Arizona

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on November 1, 1993, concerning the reasonableness of the rates charged for cable programming services by Century Cable TV of Yuma, Arizona ("Century"). In response to this complaint, the Commission issued Letter of Inquiry 93-39 ("LOI") to Century on December 13, 1993.[1] The LOI asked Century to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Century responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "|s|uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Century Cable TV of Yuma, Arizona, LOI-93-39 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 "M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Century to make refunds to subscribers in regard to Century's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(1)(2), 47 U.S.C. § 543(1)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Century's services included a 14 channel basic tier, called Basic Service, for $12.95 per month, a 10 channel cable programming service tier, called the Silver tier, for $9.65 per month, and an additional 7 channel cable programming service tier, called the Gold tier, for $2.00 per month. In order to receive the Gold tier, subscribers were required to purchase both the basic tier and the Silver tier.

7. The following chart summarizes Century's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	14	$12.95
2. Silver tier	10	$ 9.65
3. Gold tier	7	$ 2.00
Total	31	$24.60

8. Beginning September 1, 1993, the date our rate regulations became effective, Century restructured its service offerings. Century's restructured service offerings included a 28 channel basic tier, called Basic Service, for $25.06 per month and three channels it states were offered on an individual basis. The three channels were Cable News Network (CNN), the Family Channel, and Turner Network Television (TNT). TNT and CNN were originally in Century's Gold tier and the Family Channel was originally in Century's Silver tier.

9. Century states that CNN, the Family Channel and TNT could be purchased individually for $0.70 per month. All three channels could be purchased as a package, called Century Select, for $1.50 per month. Correspondence from Century to its subscribers indicated that subscribers who were receiving these three channels prior to September 1, 1993, would be automatically subscribed to the package.

10. The following chart summarizes Century's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Basic Service	28	$25.06
2. Century Select	3	$ 1.50
Total	31	$26.56

11. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Century states that 213 subscriptions to individual channels were made, while 22,470 subscribers took the Century Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Century's restructuring effective September 1, 1993, involved its movement of two channels (TNT and CNN) from its 7 channel Gold tier and one channel (the Family Channel) from its 10 channel Silver tier to create the three-channel package that it alleges is not rate-regulated. Thus, Century removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the two Gold tier channels and the one Silver tier channel at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Century's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Century's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears that Century's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Century's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that

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[13] This Order does not evaluate Century's rates for its Basic Service. These rates are subject to review by the local franchising authority in a separate proceeding.

[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Century and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cableoperator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[20]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $0.70 each or the three-channel package for $1.50. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Century's submission reveal that there were only 213 subscriptions to individual Century Select channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that there were only 213 subscriptions to individual Century Select channels, together with the other factors present in this case,[21] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Century's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[23] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Century that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Century's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Century to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Century eliminated two cable programming service tiers but moved most of the channels from those tiers into the rate regulated basic tier. Century attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling whatotherwise would be a rate

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[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[22] *Second Reconsideration Order* at ¶ 196.

[23] *Id.*

[24] *See Going Forward Order* at ¶ 40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

21. We will not require Century to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[28] Instead, on a prospective basis, we will consider Century's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Century's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Century or its Yuma customers to the confusion and transaction costs that would result if we required Century to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding Century from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-45
Owensboro, Kentucky

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 19, 1993, concerning the reasonableness of the rates charged for cable programming services by Century Cable TV of Owensboro, Kentucky ("Century"). In response to this complaint, the Commission issued Letter of Inquiry 93-45 ("LOI") to Century on December 13, 1993.[1] The LOI asked Century to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Century responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Century Cable TV of Owensboro, Kentucky, LOI-93-45 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference "Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Century to make refunds to subscribers in regard to Century's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(1)(2), 47 U.S.C. § 543(1)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Century's services included a 15 channel basic tier, called Basic Service, for $12.95 per month, an 18 channel cable programming service tier, called the Silvertier, for $9.00 per month, and an additional 6 channel cable programming service tier, called the Gold tier, for $2.00 per month. In order to receive the Gold tier, subscribers were required to purchase both the basic tier and the Silver tier.

7. The following chart summarizes Century's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	15	$12.95
2. Silver tier	18	$ 9.00
3. Gold tier	6	$ 2.00
Total	39	$23.95

8. Beginning September 1, 1993, the date our rate regulations became effective, Century restructured its service offerings. Century's restructured service offerings included a 36 channel basic tier, called Basic Service, for $22.65 per month and it states that three channels were offered on an individual basis. The three channels were Cable News Network (CNN), TBS and Turner Network Television (TNT). TNT and CNN were originally in Century's Gold tier and TBS was originally in Century's Basic tier.

9. Century states that CNN, TBS and TNT could be purchased individually for $2.00 per month. All three channels could be purchased as a package, called Century Select, for $4.50 per month.

10. The following chart summarizes Century's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Basic Service	36	$22.65
2. Century Select	3	$ 4.50
Total	39	$27.15

11. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Century states that 404 subscriptions to individual channels were made, while 20,041 subscribers took the Century Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Century's restructuring effective September 1, 1993, involved its movement of two channels (TNT and CNN) from its 6 channel Gold tier and one channel (TBS) from its 15 channel Basic Service tier to create the three-channel package that it alleges is not rate-regulated. Thus, Century removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the two Gold tier channels and the one Basic Service channel at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Century's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Century's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Century automatically subscribed its customers to the offerings that previously had been part of its cable programming service tier. In light of these facts, it appears that Century's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Century's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that

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[13] This Order does not evaluate Century's rates for its Basic Service. These rates are subject to review by the local franchising authority in a separate proceeding.

[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Century and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfiedonly when "the per channel offering provides consumers with a realistic service choice."[20]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $2.00 each or the three-channel package for $4.50. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Century's submission reveal that there were only 404 subscriptions to individual Century Select channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that there were only 404 subscriptions to individual Century Select channels, together with the other factors present in this case,[21] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[22] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Century's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[23] Moreover, our test does not explain how the factors are to be weighed againsteach other. In these circumstances, we cannot say that it was clear to Century that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[24] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Century's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Century to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[25] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Century eliminated two cable programming service tiers but moved most of the channels from those tiers into the rate regulated basic tier. Century attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a

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[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[20] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[22] *Second Reconsideration Order* at ¶ 196.

[23] *Id.*

[24] *See Going Forward Order* at ¶ 40.

[25] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

21. We will not require Century to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[28] Instead, on a prospective basis.we will consider Century's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Century's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Century or its Owensboro customers to the confusion and transaction costs that would result if we required Century to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding Century from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Seeway Broadcasters against Cablevision of Gibsonburg, Ohio — CSR-4212-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 5, 1995

By the Cable Services Bureau:

1. On January 31, 1994, Seeway Communications, Inc. licensee of low power television station W21BF (Channel 19), Defiance, Ohio, filed a complaint against Cablevision of Gibsonburg, Ohio, Inc. ("Cablevision"), operator of a cable system serving Gibsonburg, Ohio, claiming that Cablevision had declined to carry the station even though W21BF is a fully-qualified low power television station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Cablevision responded on February 24, 1994 by alleging that the station did not provide a good quality signal and, that even if it did, complainant does not satisfy the definition of a qualified LPTV station.

DISCUSSION

2. The 1992 Cable Act provides "that a cable operator is not required to carry a low power television station that does not deliver [a good quality signal] to the principal headend of a cable system. *See* 47 U.S.C. §534(h)(1)(B)(iii). Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices, as defined below, to measure the signal delivered to the headend.

3. With respect to the standard to be used to determine what constitutes a good quality signal, the 1992 Cable Act adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evidence, whether VHF or UHF low-power stations place adequate signal levels over a cable system's principal headend.

4. To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

5. Cablevision has submitted data for the Gibsonburg system consisting of four signal level readings taken over the course of a two hour period. These tests were conducted by Cablevision's Engineer on November 19 and 29, 1993. The data demonstrates, consistent with Commission requirements, that W21BF's signal strength at the cable system's principal headend is substantially below the level of -45 dBm required for UHF stations. As a result, W21BF is not eligible for must-carry status on Cablevision's system. Given our conclusion, we need not reach the other issues raised by the parties in this matter.

6. Accordingly, the petition filed January 28, 1994, by Seeway Communications, Inc., IS DENIED, pursuant to §614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934, as amended. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 23, 1994

Released: January 5, 1995

IN REPLY REFER TO:
8310-SB
94060488

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

KQQK, Inc., Licensee
Radio Station KQQK (FM), Galveston, TX
P.O. Box 2722
Houston, TX 77252

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, for violation of the Commission's Main Studio Rule, 47 C.F.R. § 73.1125. This action is taken under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On November 25 and December 20, 1991, personnel of the Commission's Field Operations Bureau (FOB) inspected the (facilities of Station KQQK(FM), Galveston, Texas. Subsequent to this investigation, the Commission issued an Official Notice of Violation, finding, in part, that the station was in violation of the Commission's Main Studio Rule. On January 31, 1992, Station KQQK responded to this Notice and on May 16, 1994, a follow-up letter of inquiry was issued. This follow-up letter questioned whether Station KQQK maintained adequate staffing at its main studio. Specifically, this letter requested the names, titles and responsibilities of Station KQQK's main studio personnel. Based upon the information obtained by FOB personnel, and the responses of KQQK, Inc. to the Official Notice of Violation and subsequent letter of inquiry, it appears that Station KQQK has repeatedly been and continues to be in violation of Section 873.1125 of the Commission's Rules.

Section 73.1125 of the Commission's Rules requires a broadcast licensee to maintain a main studio within its principal community contour "which has the capability adequately to meet its function . . . of serving the needs and interests of the residents of the station's community of license." *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024, 5026 (1988) ("*Main Studio Clarification*"). To satisfy this requirement, there must be a "meaningful management and staff presence" at the main studio on a full-time basis during regular business hours. 3 FCC Rcd at 5026; *see also Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992). Finally, the "station must equip the main studio with production and transmission facilities that meet the applicable standards [and] maintain continuous program transmission capability." *Main Studio Clarification*, 3 FCC Rcd at 5026.

In response to our Notice and inquiry, Station KQQK indicated that it maintains a main studio located on Pelican Island, near Galveston (the "GPI Studio"), with an auxiliary studio at 6006 Bellaire Blvd., Houston, Texas. In support, Station KQQK provides a copy of a December 1, 1989, agreement with Harbor Broadcasting Co., Inc., licensee of Station KGBC(AM), which permits Station KQQK to rent studio space for the "purpose of broadcasts from such studio at such times as KQQK may elect." The agreement specifies that Station KQQK will "pay for a broadcast quality telephone line from such studio" to its transmitter or, alternatively, "establish a microwave link to the transmitter." Finally, the agreement states that Station KQQK will "locate its public file at KGBC" and that KGBC "personnel will be available to answer questions relating to KQQK during regular business hours." According to the agreement, such personnel will be "considered employees of KQQK."

Although Station KQQK has provided some evidence that personnel have been located on a full-time basis at the GPI Studio, at least in part for the purposes of staffing Station KQQK, it appears that the station has not maintained a meaningful management presence at the studio. Station KQQK's response to our letter of inquiry points to an August 1, 1991, letter confirming the appointment of Mr. Vandy V. Anderson, President of Harbor Broadcasting Company, as Assistant Station Manager in charge of the GPI Studio. Station KQQK, however, has not provided sufficient evidence to establish that Mr. Anderson did, in fact, hold a managerial position at Station KQQK. Although our May 16, 1994, inquiry specifically asked the licensee to explain in full Mr. Anderson's role in operating Station KQQK and to provide documentation as to his employment status, the licensee did not give any description of Mr. Anderson's duties as Assistant Station Manager. Rather, the licensee only indicated that Mr. Anderson was available to answer questions related to Station KQQK and had "the ability, through the licensee's toll-free number, to contact immediately various KQQK personnel at the auxiliary studio." No indication is given whether Mr. Anderson was authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales or emergency procedures. *See Jones Eastern of the Outer Banks, Inc., clarified*, 7 FCC Rcd at 6801. Absent such a showing, we cannot find any confirmation that there was a significant management presence at the GPI studio.[1]

Moreover, despite the fact that we asked the licensee to provide the names, titles and responsibilities of Station KQQK's personnel assigned to the GPI studio, Station

[1] Were we to accept Station KQQK's assertion that Mr. Anderson held a managerial position at Station KQQK, we would be concerned with possible cross-interest implications because of Mr. Anderson's connections with Station KGBC. *See* Letter from Edythe Wise, Chief, Complaints & Investigations Branch, Enforcement Division, Mass Media Bureau, to Michael R. Birdsill, DA 92-1607 (December 2, 1992). However, since we find that no managerial presence existed at Station KQQK's GPI Studio, we need not address this issue.

KQQK makes no showing whatsoever regarding a management presence at the GPI Studio before the August 1, 1991, appointment of Mr. Anderson as Assistant Station Manager. Additionally, Station KQQK has informed the Commission that Mr. Anderson retired in November 1993. His duties were apparently assumed by Mr. Steven Cowan, the new General Manager of Station KGBC, but, by the licensee's own admission, Mr. Cowan has not been formally appointed as Assistant Station Manager for Station KQQK, nor has the station provided any evidence that Mr. Cowan is authorized to make managerial decisions.

It appears that from at least April 17, 1990 (the date its last renewal application was granted), to the present, Station KQQK has repeatedly violated Section 73.1125 of the Commission's Rules by failing to maintain a significant management presence at the main studio location. With respect to this violation, KQQK, Inc., is hereby advised of its apparent liability for a forfeiture of seven thousand five hundred dollars ($7,500).

The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, taking into account the nature, circumstances, extent and gravity of the violation.[2] In reaching this amount, we reviewed the precedent and compared the seriousness of Station KQQK's main studio violations with those in other main studio cases decided prior to the adoption of the *Policy Statement*, generally resulting in forfeiture amounts ranging from $5,000 to $10,000. In these cases, the forfeiture amounts were determined prior to the 1989 increase in our forfeiture authority.[3] In *Texas Key Broadcasters, Inc.*, 30 FCC 2d 146 (1971), the licensee was assessed a forfeiture of $5,000 for the relocation of its main studio without authority, a condition which lasted for approximately two years. Similarly, in *International Panorama TV, Inc.*, 52 FCC 2d 258 (1975) a licensee was issued a $5,000 forfeiture for the unauthorized relocation of its main studio for a period of four weeks. In a more recent case, *The Dalton Group, Inc.*, 6 FCC Rcd 646 (1991), the NAL and Forfeiture Order (issued prior to the 1989 increase in our forfeiture authority) imposed a $10,000 forfeiture for main studio, public inspection file, and program origination rule violations.

In this case, the evidence indicates, that the licensee has been operating in violation of our main studio rule at least since April 17, 1990 (the date its last renewal application was granted), until the present. Taking into account the length of the violation, as well as the increase in our forfeiture authority, a $7500 forfeiture is warranted.

In regard to this forfeiture, you are afforded a period of thirty (30) days from the date of this Notice "to show, in writing, why a forfeiture penalty should not be imposed or pay the forfeiture. Any showing as to why the forfeiture should not be imposed or reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R § 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this Notice.

Additionally, because it appears that you are still in violation of the main studio rule, Section 73.1125, you must take immediate remedial measures to bring yourself into compliance. Within thirty (30) days of the date hereof, you must provide documentation to this office outlining the steps you have taken to bring yourself in compliance. Since this is an ongoing violation, you are hereby notified that further similar forfeitures for additional periods of noncompliance may be issued.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

Attachments

cc: Dennis F. Begley, Esq.

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[2] In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the court set aside our *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement"*), in which we had established guidelines for determining appropriate forfeiture amounts for violations of various Commission Rules and statutory provisions, including the main studio rule. In assessing this forfeiture, therefore, we have undertaken to apply directly the statutory factors in Section 503 (b) of the Communications Act of 1934, as amended, to the particular facts of this case, giving due consideration to our past decisions that predated the *Policy Statement* and to relevant intervening legislative changes.

[3] In 1989, Congress amended Section 503(b) of the Communications Act, Pub. l No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989). Among other things, the amendment increased the dollar amounts of this agency's forfeiture authority, to better serve as a meaningful sanction and deterrent to others. *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Cong. & Ad. News at 3038.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Group H Broadcasting Corporation against Tele-Media Corporation — CSR-4088-M

Request for Carriage

Tele-Media Corporation — CSR-4034-A

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1994; Released: January 5, 1995

By the Cable Services Bureau:

1. On September 24, 1993, Group H Broadcasting Corporation ["WYED"], licensee of Television Broadcast Station WYED (Ind., Channel 17), Goldsboro, North Carolina, filed the captioned complaint requesting mandatory carriage of its signal on the cable television system operated by Tele-Media Corporation ["Tele-Media"] serving Johnston County, North Carolina. The petition was placed on public notice on October 22, 1993.[1] WYED's petition is unopposed.

2. In support of its petition (CSR-4088-M), WYED notes that it is a commercial broadcast station in the Raleigh-Durham, North Carolina ADI, in which Johnston County is located. WYED states that it has requested carriage on Tele-Media's cable system, but that Tele-Media has refused to add WYED's signal or even respond to WYED. WYED submits a copy of the letter it sent to Tele-Media on July 6, 1993, together with a copy of the return receipt dated July 12, 1993. Having received no response from Tele-Media within 30 days, states WYED, the station filed its complaint. WYED notes that its transmitter is located within Johnston County itself, as is the station's main studio, and that there is no evidence that WYED's signal is of poor quality, or that its carriage would subject Tele-Media to increased copyright liability.

3. WYED's petition establishes that it is entitled to carriage on Tele-Media's Johnston County, North Carolina system. No other pleadings have been filed in this matter. In view of the foregoing, we find that grant of WYED's petition is in the public interest.

4. In addition, on June 3, 1993, Tele-Media filed a petition (CSR-4034-A) to modify the areas of dominant influence (ADIs) of several television stations by deleting various communities from those stations' ADIs. This petition is opposed by several parties, including WYED. Tele-Media has submitted no reply to any opposition. Tele-Media's petition consists of mere conclusory allegations with no supporting documentation or evidence, save for rate and channel line-up cards dated March 1, 1993, for its various systems that are the subject of its petition. In addition, several of Tele-Media's requests are for deletions of whole counties from various ADIs, rather than community-specific requests. Tele-Media's petition, accordingly, is clearly deficient, and will be denied.

5. Accordingly, IT IS ORDERED, That the complaint (CSR-4088-M) filed September 24, 1993 by Group H Broadcasting Corporation against Tele-Media Corporation IS GRANTED, in accordance with §614(d)(3) of the Communications Act of 1934, as amended [47 U.S.C. §534(d)(3)].

6. IT IS FURTHER ORDERED, That Tele-Media Corporation SHALL COMMENCE CARRIAGE of the signal of WYED forty-five (45) days from the release date of this *Order* on Tele-Media's cable system serving Johnston County, North Carolina.

7. IT IS FURTHER ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended [47 U.S.C. §534(h)(1)(C)], and §76.59 of the Commission's Rules [47 C.F.R. §76.59], That the petition for special relief (CSR-4034-A) filed June 3, 1993, by Tele-Media Corporation IS DENIED.

8. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] *Cable Television Service Registrations Report No. 968*, Mimeo No. 40273 (released October 22, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Rural California Broadcasting Corporation against Century Cable	CSR-3880-M CA0021

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: January 5, 1995

By the Cable Services Bureau:

1. On November 24, 1993, a petition for reconsideration and request for stay was filed, on behalf of Century Cable of Northern California, Inc. ("Century"), operator of a cable system serving San Pablo, California. Century requests that the Commission reconsider its October 25, 1993 action[1] ordering its San Pablo system to carry Station KRCB-TV (Educ., Ch. 22), Cotati, California. A petition to deny this request was filed December 2, 1993, on behalf of KRCB-TV to which Century replied.

2. In support of its request, Century argues for the first time that it should not be required to carry KRCB-TV because the station's programming substantially duplicates that of two stations which Century currently carries: KQED (Educ., Ch. 9), San Francisco, California; and KCSM-TV (Educ., Ch. 60), San Mateo, California. Century states that after notifying KRCB-TV by letter dated September 17, 1993, it commissioned an independent firm, TV Data, to conduct a duplication study, the results of which indicate that KRCB-TV's programming is duplicative more than 50% of prime time and more than 50% outside of prime time. It maintains that §76.56 of the Commission's Rules provides that cable systems with more than 36 channels, such as Century's, are not required to carry stations whose programming substantially duplicates that of a station already being carried. Further, Century argues that if it is forced to carry KRCB-TV on cable channel 22 as requested, it would require substantial time, effort and expense, and further disruption to subscribers since channel 22 is currently occupied by a premium channel and it would necessary to change out traps.

3. In its petition to deny, KRCB-TV states that Century had more than enough time prior to the adoption of the Commission's order in which to present information regarding duplication. In any event, it maintains, the study that Century relies on is based on erroneous data. KRCB-TV argues that a similar study it undertook indicates a duplication of only 28%. Finally, KRCB-TV avers that channel positioning need not be an issue. It states that as early as April 14, 1993, it indicated to Century that it was willing to discuss other channel positions for its station. Therefore, it concludes, there is no reason to delay carriage.

4. In its reply to the opposition, Century reiterates its earlier arguments regarding substantial duplication and on-channel carriage. It states that it authorized TV Data, to conduct a new study to further demonstrate the duplication and it submits this information in support. Century also indicates that in addition to Stations KQED and KCSM-TV mentioned in its reconsideration, it carries a third NCE station, KMPT (Educ., Ch. 22), San Francisco, California,[2] on its system serving San Pablo.

5. We are not persuaded by the arguments raised by Century. The standard for determining whether noncommercial stations substantially duplicate each other is a two-part test. As stated in paragraph 19 of the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993):

> First, the amount of duplicative (simultaneous or non-simultaneous) prime time weekly programming broadcast over the course of a three-month period will be calculated. The end of the three-month period must fall within 30 days prior to the date the cable system notifies the NCE station that it is denying or discontinuing carriage based on substantial duplication. Second, the amount of duplicative (simultaneous or non-simultaneous) weekly programming broadcast outside prime time over the course of the same three-month period will be determined. Only if the station duplicates more than 50 percent of the other station's weekly programming in both of these respects can it be denied carriage.

Century presents summary results of a duplication study conducted by TV Data that purports to compare the programming of KRCB-TV with that of KQED using data from October 17, 1993 through December 31, 1993. In addition, Century indicates that it sent KRCB-TV a letter on September 17, 1993, explaining that it was denying the station carriage based on duplicative programming. We find this study flawed for two basic reasons. First, the *Order* requires that the data be from a period ending prior to the notification of denial of carriage, yet TV Data's study seems to begin on the same date as the notification and uses data for future periods. Moreover, it does not cover a three-month period as required, but only 11 weeks, since it apparently started in mid-October. Second, the study appears to be for prime time and total hours, as opposed to prime time and non-prime time. Further, the supplemental information Century provided in its reply cannot be used to verify any claims either since there is no explanation from either Century or TV Data as to what is actually contained therein. We therefore cannot conclude that Century has made a sufficient showing to demonstrate substantial duplication. Finally, the issue of on-channel carriage appears to be moot as KRCB-TV has expressed its willingness to negotiate on this point.

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[1] *Rural California Broadcasting Corporation against Century Cable*, DA 93-1234, 8 FCC Rcd 7599 (1993).

[2] This station was identified in a letter dated July 29, 1994, from the system's counsel.

6. In light of the above, therefore, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petition for reconsideration and request for stay, filed November 24, 1993, ARE DENIED and Century Cable IS ORDERED to commence carriage of Station KRCB-TV within forty-five (45) days of the date of this letter.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of The Citrus County Association for Retarded Citizens against Mickelson Media, Inc. d/b/a Century Cable — CSR-4226-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 6, 1995

By the Cable Services Bureau:

1. On February 1, 1994, The Citrus County Association for Retarded Citizens, licensee of low power television station W49AI (Channel 49), Inglis-Yankeetown, Florida, filed a complaint against Mickelson Media, Inc. d/b/a Century Cable ("Century"), operator of a cable system serving Inglis-Yankeetown, Florida, claiming that Century had declined to carry the station even though W49AI is a fully-qualified low power station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Century responded on May 9, 1994[1] by alleging that the station did not provide a good quality signal.

DISCUSSION

2. The 1992 Cable Act provides "that a cable operator is not required to carry a low power television station that does not deliver [a good quality signal] to the principal headend of a cable system." *See* 47 U.S.C. §534(h)(1)(B)(iii). Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices, as defined below, to measure the signal delivered to the headend.

3. With respect to the standard to be used to determine what constitutes a good quality signal, the 1992 Cable Act adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evidence, whether VHF or UHF low-power stations place adequate signal levels over a cable system's principal headend.

4. To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

5. Century has submitted data for the Inglis-Yankeetown system consisting of six signal level readings taken over the course of a 48-hour period. These tests were conducted by Century's Engineer on May 2 and 3, 1994. The data demonstrates, consistent with Commission requirements, that W49AI's signal strength at the cable system's principal headend is substantially below the level of -45 dBm required for UHF stations. As a result, W49AI is not eligible for must-carry status on Century's system.

6. Accordingly, the petition filed February 1, 1994, by The Citrus County Association for Retarded Citizens IS DENIED, pursuant to §614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934, as amended. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] Century had requested an extension of time to respond to the complaint.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-455

In the Matter of

Amendment of Section 73.202(b),	RM-5899
Table of Allotments,	RM-6223
FM Broadcast Stations.	RM-6224
(Perry, *Cross City*, Holiday,	RM-6225
Avon Park, Sarasota, and Live	RM-6226
Oak, Florida; and Thomasville,	RM-7111
Georgia)	

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: January 6, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it a Motion for Severance and Suggestion of Grant filed by Women in Florida Broadcasting, Inc., licensee of Station WDFL, Channel 292A, Cross City, Florida, directed to the *Report and Order* in this proceeding, 4 FCC Rcd 5599 (1989). For the reasons discussed below, we are granting the requested relief.

2. The *Report and Order* upgraded Station WDFL to specify operation on Channel 295C1. Included among the related actions was our denial of a separate proposal by Sarasota FM, Inc., ("Sarasota FM"), licensee of Station WSRZ, Channel 292A, Sarasota, to upgrade Station WSRZ to specify operation on Channel 293C2. In a subsequent *Memorandum Opinion and Order*, 7 FCC Rcd 2557 (1992), we denied the Petition for Reconsideration filed by Sarasota FM. Thereafter, Sarasota FM filed an Application for Review directed to our denial of its Petition for Reconsideration.

3. Under Section 1.420(f) of the Commission's Rules, the upgrade for Station WSRZ at Cross City is stayed pending the final resolution of the Sarasota FM Application for Review. *See Arlington, Texas*, 6 FCC Rcd 2050, 2051 n.2 (Comm. 1991). The Application for Review is not directed to the Station WDFL upgrade or any action that could impact on this upgrade. As a result, we believe that there is no longer any need to stay the effectiveness of the Channel 295C1 upgrade at Cross City. *See Thomasville, Georgia*, 5 FCC Rcd 7602 (1990). In any event, the grant of the application to implement this upgrade will be without prejudice and expressly conditioned upon the ultimate outcome of this proceeding.

4. Accordingly, IT IS ORDERED, That the aforementioned Motion for Severance and Suggestion of Grant filed by Women in Florida Broadcasting, Inc., IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

R. DONNIE GOODALE File No. BPH-890615MF

For Construction Permit For A
New FM Station on Channel 277A
Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 6, 1995

By the Commission:

1. The Commission has under consideration the petition for reconsideration filed on December 22, 1992 by R. Donnie Goodale ("Goodale").

2. Previously, the staff dismissed Goodale's above-captioned application pursuant to the FM "hard look" processing rules[1] because Goodale had provided inconsistent geographic coordinates for his proposed transmitter site and that inconsistency could not be resolved confidently and reliably by information available in the application. *Sundown Communications*, 5 FCC Rcd 7079 (MM Bur. 1990). On December 31, 1990, Goodale filed a petition for reconsideration of the dismissal. That petition, pursuant to 47 C.F.R. § 1.104(b), was referred to the Commission and was denied. *R. Donnie Goodale*, 7 FCC Rcd 1495 (1992) (*"Goodale I"*). On March 23, 1992, Goodale filed a petition for reconsideration of that action with the Commission. Again, reconsideration was denied. *R. Donnie Goodale*, 7 FCC Rcd 7672 (1992) (*"Goodale II"*).

3. In the instant petition for reconsideration, Goodale cites *National Family Planning v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992), a court decision decided the day after the Commission adopted *Goodale II*. That decision, Goodale contends, "strongly suggests" that the Commission erred in adopting the FM "hard look" processing rules without first undertaking a notice and comment rulemaking.

4. The Court of Appeals for the District of Columbia Circuit recently held that challenges to the "procedural lineage" of the "hard look" rules are governed by the sixty-day period provision in 28 U.S.C. § 2344 (1988). *JEM Broadcasting Company, Inc. v. FCC*, 22 F.3d 320, 325-326 (D.C. Cir. 1994), *aff'g JEM Broadcasting Company, Inc.*, 8 FCC Rcd 77 (1992).[2] Thus we reject Goodale's procedural argument concerning the 1985 "hard look" rules as untimely.[3] In any event, as the court in *JEM* also held, the "hard look" rules are procedural in nature and were properly adopted without a notice and comment rulemaking. 22 F.3d at 326-328. Moreover, the *National Family Planning* case, cited by Goodale, is inapposite because it does not concern procedural rules. Rather, it concerns the distinction between legislative and interpretative rules, a distinction not pertinent here.

5. Goodale's remaining arguments repeat contentions which he made and which we rejected in *Goodale I* and *Goodale II* and therefore do not warrant reconsideration. *See WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965); *Fresno FM Ltd. P ship*, 7 FCC Rcd 4339 (1992).

6. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on December 22, 1992 by R. Donnie Goodale IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987) (table).

[2] 28 U.S.C. § 2344 (1988) provides that any party "aggrieved" by a "final [agency] order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."

[3] The "hard look" rules became effective on June 12, 1985, 50 Fed. Reg. at 19936.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-309

In re Applications of

FRANK K. SPAIN	File No. BPH-900119MN
LOS AMIGOS MEDIA, A LIMITED PARTNERSHIP	File No. BPH-900122MM
KIMLER BROADCASTING, INC.	File No. BPH-900122MN
ARTISTIC AIRWAVE BROADCASTERS	File No. BPH-900122MP
LAURA WILKINSON HERRON	File No. BPH-900122MY
AVID COMMUNICATIONS, INC.	File No. BPH-900122NF
NATALIE LEDERER ROGERS	File No. BPH-900122NN

For Construction Permit for
New FM Station, Channel 233A,
Temecula, California

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 6, 1995

By the Commission:

1. We have before us an application for review filed on July 5, 1994 by Avid Communications, Inc. (Avid) and an opposition and an erratum filed by Artistic Airwave Broadcasters (AAB) on July 22 and August 1. Avid asks us to reverse the Review Board's memorandum opinion and order dismissing its application for non-prosecution. *Frank K. Spain*, 9 FCC Rcd 2528 (Rev. Bd. 1994). The Board noted in its opinion that Avid had neither filed exceptions to ALJ Frysiak's July 19, 1993 initial decision, 8 FCC Rcd 4831, which held that Avid's application should be denied because its qualifications were inferior to those of several rival applicants, nor requested an extension of the thirty-day deadline specified by 47 C.F.R. §1.276(a), which had long since expired. The Board pointed out, moreover, that Subsection (f) of §1.276 provides that when a party "fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed for failure to prosecute," and asserted that it had, in accordance with that rule provision, consistently dismissed the applications of parties that have not filed timely exceptions to adverse initial decisions.

2. Avid stresses, to begin with, that §1.276(f) says that when a party fails to file timely exceptions to an initial decision denying its application the application "may" (not "shall") be dismissed for failure to prosecute. Hence, according to Avid, the rule leaves discretion for leniency, and it contends that leniency is warranted here in light of circumstances that the Board declined to take into consideration. It maintains that the pertinent circumstances are that James Fakas, Avid's sole owner, took the initiative in prompting the FCC to allot Channel 233A to Temecula after its deletion of another FM assignment for which he had previously petitioned and applied, only to find himself in competition with seventeen rival applicants for the Temecula assignment; that after spending a large sum of money in prosecution of his Temecula application, Mr. Fakas decided to refrain from filing exceptions to the initial decision because he was convinced from consultation with counsel that his comparative position under the integration criterion was such that he had no hope of prevailing on appeal; and that after the time-period for filing exceptions had expired, but before the Review Board was able to consider this case, the Court of Appeals issued its decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), holding that the Commission's comparative integration policy was arbitrary and capricious.

3. Avid asserts that it was without notice prior to the filing deadline that the criterion on which the initial decision was chiefly predicated was invalid and that the applications in this proceeding would ultimately be judged under a different comparative policy, and it argues that it should therefore be allowed to remain as a party and have its application assessed against the others according to whatever new comparative policy the Commission shall devise in deference to *Bechtel*. It contends, moreover, that the initiative that its principal displayed in instigating the allotment of the channel assignment at issue indicates that his motive for prosecuting the application was *bona fide* and that his decision against filing exceptions is further proof that he did not intend to pursue it merely in order to obtain concessions via a settlement.

4. We are not persuaded that Avid's application should be reinstated. Although the last clause of §1.276(f) is permissive, the provision as a whole conveys an intention to establish a bright-line rule of finality to be upheld except in extraordinary circumstances. We see nothing in this case to cause us to reverse the decision below. There is no basis for retroactively waiving the deadline because recently released case decisions give new hope to applicants that declined to file timely exceptions. As AAB correctly asserts, to follow so lax a policy would make for an administrative quagmire.

5. Moreover, Avid should have known, when it elected to refrain from filing exceptions within the time allowed, that the *Bechtel* challenge to the validity of the integration criterion was pending and very much at issue. See *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), and *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992). More fundamentally, Avid had reason to know that the validity of any policy of this agency is open to challenge in adjudicatory proceedings by parties against whom it has been invoked. Avid could have disputed the legal validity of the erstwhile integration policy in timely-filed excep-

tions, and had it done so it would have been entitled to a ruling on the merits of its argument. Having chosen, instead, to let the filing deadline pass without filing exceptions or requesting an extension of time and having failed to show good cause for postponing the deadline, Avid is not entitled to have its application considered any further in this proceeding.

6. ACCORDINGLY, IT IS ORDERED That the application for review filed on July 5, 1994 by Avid Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. File No. BPH-890616MR

For Construction Permit for a new FM station, Channel 277A, at Lenoir, North Carolina

ORDER

Adopted: December 22, 1994; Released: January 6, 1995

By the Commission:

1. This order dismisses as repetitious a Petition for Reconsideration filed January 27, 1994 by Maria M. Ochoa.[1] In *Maria M. Ochoa*, 8 FCC Rcd 3135 (1993), the Commission found that Ochoa was not qualified to be a licensee and affirmed the Review Board's denial of her application. 7 FCC Rcd 6569 (Rev. Bd. 1992). Subsequently, the Commission denied a petition for reconsideration filed by Ochoa, but remanded for further proceedings concerning the qualifications of Foothills Broadcasting, Inc. 9 FCC Rcd 56 (1993). Ochoa now seeks reconsideration of the order denying her previous petition for reconsideration.

2. Ochoa argues that the Commission erred in relying on a witness who was biased because Ochoa had caused his salary to be cut and because he had a close relationship with a competing applicant. She further asserts that the Commission engaged in a *post hoc* rationalization concerning the ALJ's refusal to allow Ochoa to call a rebuttal witness. Ochoa also contends that the Commission should consider her arguments because, in light of the remand proceedings involving Foothills, the time is not yet ripe for her to appeal her disqualification in this proceeding. Foothills asserts that Ochoa's principal arguments were previously considered and rejected by the Commission, and that Ochoa's second petition for reconsideration should be dismissed.

3. The Commission previously denied a Petition for Reconsideration filed by Ochoa. Ochoa's instant petition is an unauthorized pleading which will be dismissed as repetitious pursuant to 47 C.F.R. § 1.106(k)(3). Its current arguments concern matters that have already been fully considered in the Commission's decision and order denying reconsideration. 8 FCC Rcd at 3136-37 ¶ ¶ 11-12, 17 and 9 FCC Rcd at 58 n.4. Ochoa's procedural argument is also without merit. She has exhausted her administrative remedies, and the time for appeal is now ripe. *Warren Price Communications, Inc.*, 7 FCC Rcd 6850 n.1 (1993). Ochoa also continues to have standing to participate with respect to the Foothills remand proceedings as long as she pursues her appellate rights concerning the denial of her application.

4. ACCORDINGLY IT IS ORDERED, That the Petition for Reconsideration filed January 27, 1994 by Maria M. Ochoa IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Also before the Commission are an Opposition filed February 7, 1994 by Foothills Broadcasting, Inc. and a reply filed February 17, 1994 by Ochoa.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC. File No. BPH-880505MS

MICHELLE N. TERZYNSKI File No. BPH-880505PL

For Construction Permit for
New FM Station on Channel 277A
Holly Hill, Florida

ORDER

Adopted: December 22, 1994; Released: January 6, 1995

By the Commission:

I. BACKGROUND

1. This order dismisses in part and denies in part a Petition for Reconsideration, filed January 12, 1994, by Central Florida Communications Group, Inc. (CFCG).[1] CFCG seeks reconsideration of a Commission order that denied review of a Review Board decision denying CFCG's application for a new FM radio station in Holly Hill, Florida and granting the mutually exclusive application of Michelle N. Terzynski. *Central Florida Communications Group, Inc.*, 8 FCC Rcd 4128 (Rev. Bd. 1993), *rev. denied*, 8 FCC Rcd 8725 (1993).

2. The Board found that CFCG did not demonstrate that it was financially qualified at the time it filed its application because it did not show the availability of sufficient assets to meet its estimated costs. 8 FCC Rcd at 4129-31 ¶ ¶ 8-11. The Board faulted a financial statement submitted by CFCG as inadequately documenting liquid assets relied on. The Board also rejected CFCG's reliance on real estate as not supported by valid appraisals. Because CFCG did not demonstrate its qualifications at the time it filed its application, the Board did not permit CFCG to rely on a bank letter obtained subsequently. The Commission denied review without comment.

II. PETITION FOR RECONSIDERATION

3. In its petition for reconsideration, CFCG reiterates its arguments that: (1) its financial statement adequately demonstrated the availability of sufficient liquid assets; (2) there is no reason to doubt the adequacy of its non-liquid assets to meet its costs; and (3) the Commission should have taken into account CFCG's bank loan.

4. Additionally, CFCG contends that changed circumstances have occurred warranting reconsideration. CFCG observes that the United States Court of Appeals recently held that the Commission's integration criterion, used in comparative proceedings, was arbitrary and capricious. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). CFCG argues that the Commission's financial qualifications policy is also arbitrary and capricious, especially as applied to minorities, and that *Bechtel* therefore dictates further review of this case.

III. DISCUSSION

5. CFCG has shown no basis for reconsideration. To the extent that CFCG merely repeats arguments concerning its financial qualifications previously made to the Commission, its petition for reconsideration is repetitious and subject to summary rejection. The provisions of 47 C.F.R. §§ 1.106(b)(2) and 1.115(g) provide that the Commission will entertain a petition for reconsideration of a ruling which denies an application for review only if the petition relies on newly discovered facts or changed circumstances.

6. The only changed circumstance noted by CFCG is *Bechtel*. That case, however, concerned the validity of the Commission's integration criterion and not financial qualifications. Additionally, CFCG did not timely challenge the facial validity of the Commission's financial qualifications policy. CFCG did not at any stage of this proceeding argue with specificity that the financial standards were arbitary and capricious on their face. Rather, it previously argued that it demonstrated its financial qualifications *consistent* with those standards. Only now -- in light of *Bechtel* -- does CFCG argue, in a conclusory fashion, that the financial standards used in comparative proceedings are arbitrary and capricious. We see nothing in *Bechtel* that would require us to entertain an untimely and conclusory challenge to the facial validity of a Commission policy unrelated to integration, as CFCG now seeks to make.

IV. ORDER

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed January 12, 1994, by Central Florida Communications Group, Inc. IS DISMISSED in part and otherwise IS DENIED.

8. IT IS FURTHER ORDERED, That the Petition to Rescind, filed March 29, 1994, by Central Florida Communications Group, Inc. IS DISMISSED as moot.

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[1] Also before the Commission are: (1) an opposition, filed January 26, 1994, by Michelle N. Terzynski, and a reply, filed February 4, 1994, by CFCG; (2) a Petition to Rescind Construction Permit, filed March 29, 1994, by CFCG, an opposition, filed April 11, 1994, by Terzynski, and a reply filed April 21, 1994, by CFCG. In its petition to rescind, CFCG asks the Commission, pending resolution of CFCG's petition for reconsideration, to rescind a construction permit issued to Terzynski. Alternatively, CFCG asks the Commission to condition the construction permit on the resolution of CFCG's petition for reconsideration. Because we are now disposing of the petition for reconsideration, the petition to rescind is moot and will be dismissed.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS — File No. BPH-880518MB

JOHN A. CAROLLO, JR. — File No. BPH-880519MX

For Construction Permit for New FM Station, Channel 229A, Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1994; Released: January 6, 1995

By the Commission:

1. We have before us an application for review filed on June 28, 1994 by Manzanita Media, Inc. (MMI).[1] MMI asks us to reverse the Review Board's ruling that its prior denial of MMI's application has become final by operation of law. 9 FCC Rcd 2530 (Rev. Bd. 1994).

2. In the memorandum opinion and order that MMI complains of, the Board noted that it had held in a decision released on November 26, 1993, 8 FCC Rcd 8237, that the captioned application of John A. Carollo should be granted and hence that the competing applications of MMI and Lucinda Felicia Paulos should be denied, having concluded that Carollo's was superior on comparative grounds.[2] The Board further noted that MMI had neither filed a petition for reconsideration of that decision pursuant to 47!C.F.R. §1.106(f)[3] nor an application for review thereof pursuant to 47 C.F.R. §1.115(d).[4] The Board then declared that because MMI had not sought reconsideration or review within the time limits specified in those rule provisions the denial of its application had become "final by operation of law" and therefore that MMI was no longer entitled to consideration as a party to this case.

3. MMI denies that the denial of its application became *res judicata* upon expiration of the 30-day deadline for filing for reconsideration or review of the Board's decision of November 26. It argues that the issuance of *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), on December 17, 1993 effectively stayed the closing of the filing period because, according to MMI, *Bechtel* implicitly barred the Commission from upholding the denial of MMI's application on comparative grounds until such time as it adopts a revised comparative policy free of the deficiencies that the court noted in its decision. MMI says that it has therefore refrained from filing for reconsideration or review of the Board's comparative decision pending reformation of the Commission's comparative policy, contending that to have done otherwise would have been a pointless and costly waste of effort. Furthermore, it contends that the Review Board's "dismissal" of its application was at odds with the Commission's announcement in a public notice released on February 25, 1994[5] that comparative cases would be held in abeyance pending resolution of the policy issues raised by *Bechtel* and its announcement that in the meanwhile the Commission, the Board, and the FCC's ALJs would "issue decisions only in cases in which consideration of . . . comparative qualifications is unnecessary." Hence, MMI asserts that it is entitled to remain a party to this proceeding and eventually to have its application judged according to new comparative criteria in keeping with *Bechtel*.

4. We are not persuaded. Even if viewed as a dismissal order, as MMI describes it, rather than as a merely ministerial action, as the Board characterized it, the Board's order of June 3 was not inconsistent with the Commission's freeze notice, which was issued long after MMI's deadline for requesting review. The notice did not say that no application would be disposed of in a comparative case during the freeze. It said, rather, that "preparation of decisions *involving analysis of applicants' comparative proposals*" (emphasis added) would be held in abeyance and, likewise, that comparative hearing procedures would be suspended "*except those aspects of hearing proceedings not involving comparative analysis of new applicants' proposals*" (emphasis added). The order in question was not a decision of the kind subject to the freeze because it did not turn on analysis of the comparative merits of any application.

5. The other leg of MMI's argument is also lacking in merit. Contrary to MMI's assertion, the holding in *Bechtel* did not legally bar the Commission from ruling on the merits of appeals from the Board's comparative determination in this case pending revision of the comparative criteria pursuant to a rulemaking. The ruling in *Bechtel* in no way prevented MMI from arguing for reversal of the denial of its application in a timely-filed application for review or petition for reconsideration, nor did it preclude the Commission from considering such arguments. Having let the deadline pass without filing for reconsideration or review or showing good cause for extending the deadline for review, MMI cannot point to any valid equitable reason for relieving it from the appropriate consequences of its failure to prosecute.

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[1] Oppositions were filed on July 7 and 13, 1994 by Lucinda Felicia Paulos and John A. Carollo, Jr.

[2] The subject memorandum opinion and order was occasioned by a petition to dismiss addressed to the Board, which still retained jurisdiction over the case because Paulos had filed a petition for reconsideration of its final decision.

[3] 47 C.F.R. §1.106(f) states that petitions for reconsideration of a decision by the FCC itself or of a decision issued under authority delegated by it shall be filed within 30 days from the decision's date of public notice.

[4] 47 C.F.R. §1.115(d) provides that (with one exception that is not germane) an application for review by the Commission *en banc* of an action issued under delegated authority shall be filed within 30 days of the action's date of public notice.

[5] *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055.

6. We thus agree with the Board that the denial of MMI's application is no longer open to review on the merits and that its proposal is entitled to no further consideration in this proceeding.

7. ACCORDINGLY, IT IS ORDERED that the application for review filed by Manzanita Media, Inc. on June 28, 1994 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PECOS INDEPENDENT SCHOOLS
Sante Fe, New Mexico — File No. BPLIF-920608DE

THE COLLEGE OF SANTE FE
Sante Fe, New Mexico — File No. BPLIF-921120DR

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels B1-B4

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: January 6, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Pecos Independent Schools (Pecos) and The College of Santa Fe (College), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the area of Santa Fe, New Mexico.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Pecos is a school district that is accredited by the State of New Mexico Department of Education and that is applying to provide ITFS service to students enrolled at schools within its jurisdiction. College is an educational institution that is accredited by the North Central Association of Colleges and Schools and that is applying to provide ITFS service to its own enrolled students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Pecos is entitled to four points because it is a school district that proposes to serve the formal educational needs of students enrolled at schools located within its jurisdiction. Likewise, College is entitled to four points because it is an educational institution that proposes to serve the formal educational needs of its own enrolled students.

Accreditation. Pecos is entitled to three points because it is accredited by the State of New Mexico Department of Education. College is also entitled to three points because it is accredited by the North Central Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Pecos's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Pecos is entitled to one programming merit point. In contrast, College's illustrative schedule and programming grid, as timely amended, propose an average of 42 hours of formal educational programming per channel per week. Thus, College is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Pecos is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. College is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, the tentative selectee is College.

OTHER MATTERS

5. College proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with MultiMedia Development Corporation, which conforms in all aspects with our requirements for such leases.

6. No petitions to deny or informal objections have been filed against College's application, and we find College fully qualified to be an ITFS licensee. We also conclude that grant of College's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Pecos Independent Schools (BPLIF-920608DE) IS DENIED, and the application of The College of Sante Fe (BPLIF-921120DR) is GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CRAWFORD COMMUNICATIONS, INC. File No. I-T-C-94-410

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and various international points via the INTELSAT, Pan American Satellite, Solidaridad, Morelos and Anik satellite systems for provision of international video services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1994; Released: January 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and various international points via the INTELSAT, Pan American Satellite (PAS), Solidaridad, Morelos and Anik satellite systems for the provision of international video services, it is hereby CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-410 IS GRANTED, and Crawford Communications, Inc. dba Crawford Satellite Services (Crawford) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites, connecting with similar circuits provided by Crawford's correspondents, for provision of International Television Service between the United States and the international points listed in Comsat's Tariff for the space segment of this service;

b. establish channels of communication between appropriately licensed earth stations in the United States and the PAS system, connecting with similar circuits between the satellites and those countries specified in the Appendix hereto, furnished by Crawford's correspondents in those countries;

c. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS satellite system;

d. lease and operate necessary domestic connecting facilities;

e. use the facilities set forth in b, c, and d, above to provide International Television Service between the United States and those countries listed in the Appendix hereto subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

f. establish channels of communication between appropriately licensed earth stations in the United States and the Mexican Morelos and Solidaridad satellite systems for the provision of television service between the United States and Mexico consistent with INTELSAT Article XIV(d) consultations governing the use of the Solidaridad system; and

g. establish channels of communication between appropriately licensed earth stations in the United States and the Canadian Anik satellite system for the provision of television service between the United States and Canada consistent with INTELSAT Article XIV(d) consultations governing the use of the Anik system.

3. IT IS FURTHER ORDERED that neither Crawford nor any persons or companies directly or indirectly controlling or controlled by Crawford, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Crawford or any persons or companies controlling or controlled by Crawford are parties.

4. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS satellite system.

8. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to the limitations specified under the separate systems policy, applicable consultations under Article XIV(d) of the INTELSAT Agreement and PAS's determination whether such capacity can be offered in light of these limitations.

9. This order is issued pursuant to Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

Crawford is authorized to provide via the PAS satellite system a total of ten (10) 36-Mhz transponders on each of the following satellites for the provision of International Television Service between the United States and the following countries:

PAS-1

Ku-band Countries:

Anguilla, Austria, Azerbaijan, Bahamas, Belgium, Bermuda, British Virgin Islands, Cayman Islands, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Monaco, Montserrat, Netherlands, Portugal, Romania, Russian Federation, Somalia, Spain, Sweden, Switzerland, Turks and Caicos Islands, the United Kingdom, Yugoslavia.

C-band Countries:

Anguilla, Argentina, Aruba, Bahamas, Barbados, Bermuda, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Montserrat, Netherlands Antilles, Panama, Paraguay, Peru, Trinidad and Tobago, Turks and Caicos Islands, Uruguay and Venezuela.

PAS-4

Australia, Hong Kong, New Zealand.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-94-509

Application for authority to acquire and operate capacity in the Asia Pacific Cable Network.

ORDER AND AUTHORIZATION

Adopted: December 27, 1994; Released: January 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-509 IS GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. acquire on an ownership basis and operate 16 half-MIUs[1] in the Asia Pacific Cable Network, as follows:

Segment	No. of MIUs
Japan-Hong Kong	7
Japan-Thailand	3
Japan-Malaysia	3
Japan-Singapore	2
Japan-Indonesia	1

b. lease a one-half interest in and operate necessary overseas connecting facilities; and

c. multiply the bearer channels authorized herein, through the use of Digital Circuit Multiplication Equipment, to obtain the maximum number of circuits available; and

d. activate and operate these facilities to provide AT&T's regularly authorized services between the United States and points in the Pacific area AT&T is authorized to serve.

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MA for the Asia Pacific Cable Network, as well as any Commission Order granting authority to acquire and operate facilities in the Asia Pacific Cable Network.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MIU is a unit of ownership designated as the Minimum Investment Unit in the ITUR Cable System. It is a 2.048 Mbps digital bit stream and consists of two half-interests which are assigned to two correspondents for joint use or to one Party. (See ITUR C&MA).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

File No. I-T-C-94-511

Application for authority to convey capacity in the HAW-5 Cable System, and to acquire and operate capacity in the HAW-4/TPC-3 Cable System.

ORDER AND AUTHORIZATION

Adopted: December 27, 1994; Released: January 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-511 IS GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. convey to Kokusai Denshin Denwa Co., Ltd. (KDD) on an Indefeasible Right of User (IRU) basis a one-half interest in 48 MAUOs[1] in the HAW-5 Cable System;

b. acquire from KDD on an IRU basis a one-half interest in 48 MAUOs in the HAW-4/TPC-3 Cable System;

c. lease a one-half interest in and operate necessary overseas connecting facilities; and

d. use said facilities to provide AT&T's regularly authorized services between the United States, Hawaii and points in the Pacific area AT&T is authorized to serve.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A Minimum Assignable Unit of Ownership (MAUO) is a 64-kbps circuit equivalent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN
TELEPHONE AND
TELEGRAPH COMPANY

Application for authority to convey capacity in the TCS-1 Cable System.	File No. I-T-C-95-046
Application for authority to convey capacity in the AMERICAS-1 Cable System.	File No. I-T-C-95-047

ORDER AND AUTHORIZATION

Adopted: December 27, 1994; Released: January 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-046 and I-T-C-95-047 ARE GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. convey to the St. Thomas and San Juan Telephone Company on an Indefeasible Right of User (IRU) basis a one-half interest in 24 MAUOs[1] in the Puerto Rico-Dominican Republic segment of the TCS-1 Cable System;

b. convey to TRT/FTC Communications, Inc. on an IRU basis a one-half interest in 30 MAUOs in the Florida-Puerto Rico and Puerto Rico-Dominican Republic segments of the TCS-1 Cable System;[2] and

c. convey to Cable and Wireless Network Services Limited on an IRU basis a one-half interest in one MIU[3] in the AMERICAS-1 Cable System between Vero Beach, Florida and Magens Bay, St. Thomas.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MAUO is a Minimum Assignable Unit of Ownership, which is a 64-kbps circuit equivalent.

[2] This capacity was originally conveyed to TRT on a temporary IRU basis for the period December 1, 1993 through December 31, 1994. TRT has now requested to keep the capacity on a permanent IRU basis. *See* File No. I-T-C-91-207, 6 FCC Rcd 7192 (1991).

[3] A MIU is defined in the Americas-1 Construction and Maintenance Agreement as the minimum unit of investment for ownership allowing the use of 2.048 Mbps and the additional 162.539 bps required for multiplexing in each direction. Each MIU includes 30 64-kbps voice paths.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION — File No. CSS-90-007-LA

Application for authority to participate in the launch of the INTELSAT VII (F-4)

ORDER AND AUTHORIZATION

Adopted: December 29, 1994; Released: January 6, 1995

By the Chief, Satellite and Radiocommunication Division:

1. The Commission has under consideration the above-captioned application filed by the Communications Satellite Corporation (Comsat) (now COMSAT Corporation) on May 18, 1990, and supplemented on September 6, 1990 and October 11, 1994, for authority to participate in the launch, positioning and in-orbit testing of the INTELSAT VII (F-4) satellite, hereafter referred to as the INTELSAT 704 satellite. The application appeared on the Commission's Public Notice on June 20, 1990. Comments were received by Pan American Satellite (PAS) on July 20, 1990.[1]

2. Authority to construct and operate the INTELSAT 704 satellite was granted in an order released February 5, 1990.[2] The satellite has been constructed and delivered. Current INTELSAT deployment plans approved by the INTELSAT Board of Governors at the BG-102 September 1994 meeting call for the launch to take place on January 4, 1995, utilizing an Atlas IIAS launch vehicle. This satellite will replace the INTELSAT VM (F-5) at 66^0 East Longitude in the Indian Ocean Region (IOR).

3. The estimated costs associated with the INTELSAT 704 satellite are as follows (all amounts in real year dollars):

SS/Loral Contract	$ 82.7 million
SS/Launch Support	$ 2.9 million
Performance incentives, Capitalized	$ 2.6 million
Performance incentives, Expensed	$ 24.1 million
Support Contracts	$ 3.3 million
Launch Services Atlas IIAS	$102.6 million
TOTAL INTELSAT cost	$218.2 million
TOTAL COMSAT cost (based on current ownership share of 20.13%)	$ 43.9 million

4. The Commission has already determined that Comsat's participation in the procurement of the INTELSAT VII satellites is required to meet traffic requirements. We therefore find that the public interest will be served a grant of Comsat's application for the launch of the INTELSAT 704 satellite as conditioned.

5. Accordingly, IT IS ORDERED that Comsat's application to participate in the launch and test program of the INTELSAT 704 satellite to be positioned at 66^0 East Longitude, IS GRANTED subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT 704 satellite only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission;

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order; and

[1] PAS's comments are now moot. PAS initially asked that any action by the Commission be without prejudice to: 1) its appeal of the Commission's February 1990 decision authorizing Comsat's participation in the procurement of INTELSAT VII satellites; and 2) its complaint alleging that Comsat's participation in the INTELSAT VII procurement prior to receiving Commission approval constituted a violation of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-711, the Communications Satellite Act of 1962, 47 U.S.C. §§ 701-757 and policy guidelines. Both matters have been resolved. *See* Pan American Satellite v. F.C.C., No. 90-1134 (D.C. Cir., September 19, 1990)(order dismissing PAS's appeal) and Pan American Satellite, 8 FCC Rcd 5622 (1993)(dismissing PAS's complaint).

[2] Communications Satellite Corporation, 5 FCC Rcd 753 (1990).

6. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and
Radiocommunication Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

PUERTO RICO TELEPHONE COMPANY — File No. W-P-C-6949

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to test new technologies for use in a Video Dialtone trial in portions of Puerto Rico Telephone Company's network and service areas.

ORDER AND AUTHORIZATION

Adopted: December 1, 1994; Released: December 5, 1994

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION

1. Puerto Rico Telephone Company (PRTC) has filed an application pursuant to Section 214 of the Communications Act of 1934, as amended (Communications Act or the Act),[1] for authority to conduct a technical trial of video dialtone facilities and services.[2] PRTC requests authority to test fiber-to-the-curb (FTTC) and asymmetric digital subscriber line (ADSL) facilities for the provision of video dialtone services for a period of one year. PRTC proposes to pass 250 homes, 18 public schools, and 12 of its business offices with its video dialtone facilities. Cable Systems USA Partners d/b/a Cable TV Del Noroeste (Cable Systems USA), Caguas-Humacao Cable Systems (Caguas), Century ML Cable Corp. (Century), and The Puerto Rico Cable Television Association (PRCTA) have filed pleadings against PRTC's application.[3]

2. For the reasons set forth below, we grant PRTC's application, subject to certain conditions and requirements that are designed to protect the interests of video programmers, video dialtone subscribers, and telephone ratepayers.

II. BACKGROUND

3. In the *Second Report and Order*,[4] the Commission adopted a regulatory framework whereby local telephone companies could participate in the video marketplace, without violating the statutory telephone company-cable television cross-ownership restrictions.[5] The Commission defined "video dialtone" as local telephone company provision of a basic common carrier platform to multiple video programmers on a non-discriminatory basis.[6] The Commission also determined that carriers must file a Section 214 application before constructing video dialtone facilities.[7]

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[1] 47 U.S.C. § 214.

[2] Application of Puerto Rico Telephone Company, File No. W-P-C-6949, filed April 13, 1994 (Application).

[3] Cable Systems USA, Caguas, and PRCTA filed petitions to deny the application on May 20, 1994. PRTC submitted an opposition to the petitions on June 2, 1994. Cable Systems USA, Caguas, Century, and PRCTA filed replies on June 14, 1994.

[4] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Second Report and Order*), *aff'd & modified on recon.*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994) (*VDT Recon Order*), *appeals pending sub nom. Mankato Citizens Tel. Co., et al. v. FCC*, No. 92-1404, *et al.* (D.C. Cir. Sept. 9, 1992).

[5] In August, 1993, the U.S. District Court for the Eastern District of Virginia declared the statutory telephone company-cable television cross-ownership restriction, codified at 47 U.S.C. § 533(b), unconstitutional because the restriction violates the First Amendment. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993). This decision applies only to Bell Atlantic and its subsidiaries. Recently, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision. *Chesapeake & Potomac Tel. Co. v. United States*, No. 93-2340 (4th Cir. Nov. 21, 1994). Three other federal district courts have also found the statutory cross-ownership restriction unconstitutional. *See U S WEST, Inc. v. United States*, No. C93-1523R (W.D. Wash. June 15, 1994); *BellSouth Corp. v. United States*, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); *Ameritech Corp. v. United States*, No. 93 C 6642 (N.D. Ill. Oct. 27, 1994).

[6] A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can gain access to any or all video programming carried on that platform. If a local telephone company provides such a basic platform, it may also provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. *Second Report and Order*, 7 FCC Rcd at 5783, para. 2.

[7] *Id.* at 5820, para. 72; *see infra* para. 17 (in the *VDT Recon Order*, the Commission affirmed its decision that carriers would be required to request Section 214 authorization to construct video dialtone facilities and offer video dialtone service, but

The Application

4. PRTC proposes to deploy, operate, own, and maintain FTTC and ADSL facilities for the provision of video dialtone services on a limited trial basis. PRTC requests Section 214 certification to conduct a technical trial of these delivery systems by passing 250 residential customers, 18 public schools, and 12 of its business offices for a period of one year.[8] PRTC plans to serve its business offices and the schools using ADSL technology.[9] Residential customers, on the other hand, will be served using FTTC facilities.[10]

5. PRTC requests permission to equip its existing fiber optic and copper-based facilities with the required hardware and software to offer video dialtone service. To test ADSL technology, PRTC states that it must install equipment at both ends of the subscriber loop to enable the delivery of compressed video signals to the end-user. According to PRTC, ADSL technology is capable of delivering a single, uni-directional, compressed video signal to the end-user's premises.[11] PRTC also proposes to deploy BroadBand Technologies' Fiber Loop Access (FLX) system that basically consists of fiber optic distribution facilities (FTTC facilities) from a host digital terminal (HDT) to an optical network unit (ONU) that would serve eight homes.[12] PRTC states that this FTTC platform will initially offer 64 digital channels.[13]

6. PRTC states that the video dialtone platform will have sufficient capacity to offer nondiscriminatory access to multiple video programmers, and provide a level 1 gateway for end-user subscribers to select the programming they want to view.[14] PRTC states that it is not affiliated with any programmer-customer who will provide programming over PRTC's video dialtone network.[15] PRTC also states that while the existing cross-ownership statutory ban remains in place, it will not provide any video programming transported over the network, either directly or indirectly through an affiliate.[16] PRTC states that digital set-top converters will be required at the end-user's premises to convert the digital video signals to an NTSC analog signal.[17] PRTC will make set-top converters available to end-user subscribers and programmers at no charge during the trial.[18] In addition, PRTC will not charge programmer-customers or video dialtone subscribers during the trial.[19] PRTC asserts that it will not have any responsibility in the selection, packaging, or pricing of any programming transported over the video dialtone network.[20]

7. PRTC claims that consistent with previous Section 214 video dialtone authorizations, it will account for its costs and expenses for regulated and non-regulated services in accordance with Commission rules. For example, PRTC maintains that "investment and expenses associated with the facilities used in the trial will be accounted for in accordance with Part 32" of the Commission's rules.[21] In addition, to the extent it offers enhanced and non-common carrier services, PRTC states that the costs of these services will be accounted for in accordance with Part 32 and Part 64 of the rules.[22] Other than video customer premises equipment and inside wiring services, PRTC states that it will not initially offer any other non-common carrier services associated with video dialtone.[23]

III. DISCUSSION

8. Applications to construct video dialtone facilities and offer video dialtone services must satisfy the requirements of the *Second Report and Order*, the *VDT Recon Order*, Section 214 of the Act, and the rules implementing Section 214. The first section of this Order addresses issues raised by the petitioners concerning the requirements of the *Second Report and Order*. The second section sets forth the legal standard of Section 214 and the application of this standard to the instant application. In this section, we also address several issues raised by petitioners regarding the nature and sufficiency of PRTC's application; the ownership status of PRTC; cost and cross-subsidy issues; and whether PRTC has prematurely constructed its video dialtone system.

A. Second Report and Order Issues

9. For local telephone companies to offer video dialtone service, they must make available a basic common carrier platform to multiple video programmers on a nondiscriminatory basis, and a means by which customers can access any and all of the video programming offered.[24] The platform must provide "sufficient capacity to serve multiple video programmers."[25] The basic platform must also be available on a nondiscriminatory, unbundled basis, so that unaffiliated service providers may offer non-regulated or enhanced services in competition with any telephone company-provided non-regulated services.[26] In addition, telephone companies are prohibited from selecting video programming or determining how programming is presented for sale to consumers, including making decisions concerning bundling or "tiering," or the price, terms, and conditions of video programming offered to consumers.[27]

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refined and clarified the reasoning for its decision). Generally, Section 214 requires Commission authorization before a carrier extends a new line of interstate communication.

[8] Application at 2. PRTC asks that the trial period commence 180 days following the grant of its application because PRTC is a public agency and must comply with Puerto Rico government procurement regulations. *Id.* at 10.

[9] *Id.* at 2.

[10] *Id.*

[11] *Id.* at 6; Exhibit 6.

[12] *Id.* at 6, Exhibit 6 at 2.

[13] *Id.* at 6. PRTC claims that the FTTC system will be capable of offering 384 digital channels in the "near future," and could eventually offer 1,536 digital channels. *Id.*

[14] Application at 2, 3, 5.

[15] *Id.* at 9.

[16] *Id.*

[17] *Id.* at 5. NTSC is the acronym for National Television Standards Committee. NTSC is used to describe the standard method of television transmission in North America. H. Newton, Newton's Telecom Dictionary (5th ed. 1992).

[18] *Id.*

[19] *Id.* at 2; PRTC Opposition at 6.

[20] Application at 9.

[21] *Id.* at 8.

[22] *Id.*

[23] *Id.*

[24] *Second Report and Order*, 7 FCC Rcd at 5783, 5797, paras. 2, 29; *see VDT Recon Order* at 16-17, paras. 30-33.

[25] *Second Report and Order*, 7 FCC Rcd at 5797, para. 29; *VDT Recon Order* at 16, para. 33.

[26] *Second Report and Order*, 7 FCC Rcd at 5831, para. 94.

[27] *Id.* at 5789, para. 14; *see VDT Recon Order* at 12, 53, paras. 18, 109.

Pleadings

10. PRCTA claims that PRTC intends to provide its own video programming over the video dialtone network, once the statutory ban against such activity is repealed.[28] According to PRCTA, PRTC's provision of video programming over its video dialtone network would violate the ownership and affiliation restrictions contained in the *Second Report and Order*.[29] PRCTA also contends that PRTC fails to provide sufficient information regarding its programmer-customers.[30] PRCTA claims that this information is relevant in order to determine whether there is legitimate interest in PRTC's proposed platform.[31] PRCTA argues that PRTC should be compelled to identify potential programmer-customers, the programmer's requested channel capacity, and the likelihood that negotiations will lead to an agreement between the programmer and PRTC.[32] In addition, PRCTA contends that PRTC does not indicate its intent to comply with the *Second Report and Order*'s requirement that basic service be offered on an unbundled basis, and that any service provider that desires to offer a video gateway or other enhanced service will be able to gain access to the network on a nondiscriminatory basis.[33]

11. PRCTA also argues that the video marketplace is competitively imbalanced because cable operators are subject to local, state, and federal regulations that do not apply to telephone companies offering video dialtone.[34] PRCTA urges the Commission to require PRTC and its video programmer-customers to obtain a franchise, arguing that PRTC's proposed network would create a "cable system" as defined in the Communications Act "because it would involve a set of closed transmission paths which cross public rights of way to connect multiple subscribers."[35]

12. In opposition, PRTC states that in the *Second Report and Order*, the Commission recommended that Congress repeal the cable-telco cross-ownership restriction.[36] PRTC avers that it will not offer its own video programming over the platform until the statutory and regulatory restrictions are removed.[37] PRTC also states that it will not be affiliated with any video programmer that will be offering video programming over the network.[38] With regard to access to the platform and other services, PRTC argues that its application plainly states that it intends to provide video programmers nondiscriminatory access to the basic platform and its video storage server.[39] Finally, PRTC argues that the issue of whether carriers offering video dialtone should be required to obtain a franchise has already been considered and rejected by the Commission in a rulemaking of general applicability, and should not be reconsidered in the context of this video dialtone application.[40]

Discussion

13. Consistent with the previous orders authorizing trials of ADSL or FTTC platforms, we find that PRTC will be providing a common carrier platform with sufficient capacity to serve multiple video programmers.[41] We conclude that PRTC's use of ADSL transport technology for this trial satisfies the capacity requirement set forth in the *Second Report and Order*.[42] Similarly, the system capacity of the FTTC facilities is adequate to serve multiple video programmers. We also note that PRTC has committed to providing video programmers nondiscriminatory access to the basic platform.[43] PRTC's application clearly states that it "intends to provide video programmer access to the basic platform on a nondiscriminatory basis limited only by the equipment features and capacity."[44] PRTC will be required to expand the system capacity to the extent that expansion is technically feasible and economically reasonable in the context of its trial.[45] PRTC will be required to notify the Chief of the Common Carrier Bureau of any anticipated or existing capacity shortfall and of plans for addressing such shortfall.[46] Such notice must be provided within thirty days of the date PRTC becomes aware of an anticipated capacity shortfall or within five days of denying a video programmer access to the video dialtone platform because of capacity limitations, whichever occurs first.[47] To the extent PRTC concludes that expansion of the platform's capacity during the trial is not technically feasible or economically reasonable, it must, at that time, explain in detail the basis for its determination.[48]

14. In the *Second Report and Order*, the Commission stated that local telephone companies may not determine how video programming is presented for sale to consumers, including making decisions concerning bundling, or "tiering," or the price, terms, and conditions of the provision of video programming to consumers.[49] PRTC states that it will have no role in the selection, packaging, or pricing of video programming offered over the video dialtone network.[50] PRTC also states that it is not affiliated with any programmer-customer who will purchase capacity and offer video programming during the trial.[51] Thus, we find that PRTC will not be impermissibly involved in the

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[28] PRCTA Petition at 23.
[29] *Id.* at 22 (citing *Second Report and Order*, 7 FCC Rcd at 5798-99, para. 30).
[30] *Id.* at 22.
[31] *Id.* PRCTA asserts that this information would be consistent with the information requested in New York Telephone's Section 214 application proceeding, File No. W-P-C-6836. *Id.*
[32] *Id.*
[33] *Id.* at 21.
[34] *Id.* at 12-15.
[35] *Id.* at 15, 16.
[36] PRTC Opposition at 4.4
[37] *Id.*
[38] *Id.* at 9.
[39] *Id.* at 4 (citing Application at 5, 9).
[40] *Id.* at 16-17 (citing Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 300, 324-25 (1991), *aff'd*, 7 FCC Rcd 5069 (1992)).
[41] We note that no party challenged the proposed system capacity or ability of the platform to serve multiple video programmers.
[42] *See* The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd at 2315, para. 11; Rochester Tel. Corp., 9 FCC Rcd at 2286, para. 14.
[43] *See supra* note 39 and accompanying text.
[44] Application at 5.
[45] *See VDT Recon Order* at 18, para. 38.
[46] *Id.*
[47] *VDT Recon Order* at 18, para. 38; *see* The Southern New England Tel. Co., FCC 94-297, at 15-16, para. 24. Copies of any notice must also be served on the Chiefs of the Policy and Program Planning Division and Domestic Facilities Division.
[48] *VDT Recon Order* at 18, para. 38.
[49] 7 FCC Rcd at 5789, para. 14, 5817, para. 69.
[50] PRTC Opposition at 9.
[51] *Id.*; *see VDT Recon Order* at 32-38, paras. 64-74 (affirming ownership affiliation standards). We find petitioners' request for information regarding the platform's video programmer-cus-

offering or presentation of video programming to subscribers. In its application, PRTC has not proposed to use the platform to provide, either directly or indirectly through an affiliate, video programming to subscribers during the trial.[52] Telephone company provision of video programming (if otherwise lawful) raises a host of regulatory issues not addressed in any detail in this record that would need to be decided prior to permitting such activity. Allowing PRTC to provide video programming in advance of resolving these issues would not serve the public interest. We therefore conclude that the public convenience and necessity requires, at this time, a condition on this authorization that PRTC not, either directly or indirectly through an affiliate, provide video programming directly to subscribers on this video dialtone system without further action by the Commission.

15. In the *Second Report and Order*, the Commission mandated that, in order to meet public interest goals, the basic service portion of the platform must be offered on a nondiscriminatory, unbundled basis to other unaffiliated enhanced service providers.[53] For that reason, PRTC will be required to unbundle its basic platform so that any service provider that desires to offer a second-level, nonregulated video gateway (or other enhanced service) will be able to do so in competition with a PRTC-provided level-two gateway or enhanced service.[54]

16. PRCTA urges the Commission to require PRTC to obtain a local franchise for its proposed video dialtone system.[55] In the *First Report and Order*, the Commission concluded, however, that neither a telephone company providing video dialtone service, nor its video programmer-customers, would be required to obtain a cable television franchise under Section 621(b) of the Cable Act.[56] Recently, the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the Commission's interpretation of Section 621(b) of the Cable Act.[57] Thus, based on the conclusion in the *First Report and Order*, as clarified in the subsequent *VDT-Franchise MO&O*, and affirmed by the D.C. Circuit, we conclude that PRTC is not required to obtain a cable television franchise.

B. Section 214 Issues

1. Section 214 Legal Standard

17. In the VDT Recon Order, the Commission affirmed its decision to require that local telephone companies obtain approval pursuant to Section 214 of the Communications Act before beginning construction of video dialtone facilities or offering video dialtone service.[58] Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. It has become clear through the Section 214 application process for video dialtone that local telephone companies will use video dialtone systems for interstate communications, including delivering video programming transmitted by means of radio waves. Before the Commission can grant a Section 214 authorization, it must determine that a grant would serve the "public convenience and necessity."[59] Traditionally, the focus of the Section 214 review has been "to ensure that carriers prudently invest in equipment so as to avoid waste and unreasonably high rates" for telephone ratepayers.[60] The courts have granted the Commissionits determinations under Section 214.[61]

18. Generally, trials are tests of a controlled experimental nature that are typically limited in duration and in scope. The Commission has previously held that "a trial [application for video dialtone], by definition, is not generally susceptible to the same level of precision" as an application for permanent, commercial video dialtone service.[62] An application for commercial video dialtone service must contain a greater level of specificity.[63] The reasoning behind this policy is that the potential benefits that may be realized by conducting limited trials may outweigh perceived risks created by subjecting video dialtone trial applications to less scrutiny. We believe that the public interest is served by approving applications for limited video dialtone trials, but believe it is necessary to impose

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tomers irrelevant to our consideration of PRTC's application, and therefore, reject petitioners' request. *See* PRCTA Petition at 22. The question of whether there is legitimate interest in PRTC's platform is one answered by conducting a trial. We note that PRTC will be required to file two reports with the Commission identifying the video programmers on the platform and the capacity allotted to each. *See infra* para. 54(g)(1).

[52] *See* Application at 9.

[53] 7 FCC Rcd at 5831, para. 94. We found that carriers other than the BOCs would not be required to further unbundle the basic video dialtone platform into Basic Service Elements (BSEs). *Id.* n.246; *see id.* at 5830, para. 93.

[54] *See Second Report and Order*, 7 FCC Rcd at 5831, para. 94. In the *Second Report and Order*, the Commission stated that a "video gateway . . . would permit consumers to select and receive video programming made available by video programmers." 7 FCC Rcd at 5784 n.5. The Commission did not, however, require or specify any functionality that a video gateway should have. *Id.* at 5811 n.146.

[55] PRCTA's arguments regarding purported regulatory disparity are inappropriate and beyond the scope of this limited video dialtone trial authorization.

[56] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300, 325-26, paras. 50-52 (1991) (*First Report and Order*), *recon. granted*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) (*VDT-Franchise MO&O*) (clarification of decision not to require cable television franchises for telephone companies and video programmers).

[57] *National Cable Television Ass'n v. FCC*, No. 91-1649, slip op. at 9, 13, 14, 16 (D.C. Cir. August 26, 1994).

[58] *VDT Recon Order* at 66, paras. 136-137.

[59] 47 U.S.C. § 214(c).

[60] AT&T Request for Authorization to Supplement Existing Lines, File No. W-P-C-5560 (released March 10, 1986).

[61] *Century Federal, Inc. v. FCC*, 846 F.2d 1479 (D.C. Cir. 1988); *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). In *General Telephone Company of the Southwest*, the court noted that "'[t]he Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. . . . [B]ut the Commission must at least warrant . . . that competition [resulting from the grant] would serve some beneficial purpose . . . .'" *General Telephone Company of the Southwest*, 449 F.2d at 858 (citing *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953)).

[62] New York Tel. Co., 8 FCC Rcd at 4330, para. 26; *see* U S WEST Communications, Inc., 9 FCC Rcd at 188, n.57.

[63] *See* New York Tel. Co., 8 FCC Rcd at 4330, para. 26.

certain conditions on trial authorizations designed to protect the interests of telephone ratepayers, video programmers-customers, and video dialtone end-users.

2. Nature and Scope of Application

Pleadings

19. PRCTA and Caguas contend that PRTC's proposal is not a *bona fide* trial of video dialtone services because the technologies PRTC proposes to test, FTTC and ADSL, are neither new nor experimental, nor do these technologies have any nexus to video dialtone.[64] Petitioners argue that PRTC's own application states that it will utilize "existing FTTC equipment and facilities" for its video dialtone service, and according to petitioners, such infrastructure could not be the basis for a trial of so-called new technologies.[65] Petitioners also argue that the scope of PRTC's proposal is too broad to qualify as a trial.[66] Petitioners argue that the geographic scope and types of subscribers are "without precedent."[67]

20. In addition, PRCTA and Caguas claim that PRTC's proposed trial is actually permanent in nature, and PRTC intends its video dialtone network to be permanent.[68] Petitioners assert that PRTC intends its video dialtone infrastructure to be permanent because PRTC proposes to spend $2.3 million on equipment and offer a multitude of services in addition to transporting video programming.[69]

21. In response to arguments that the proposed technologies are not new, PRTC states that the Commission granted the U S WEST video dialtone application to provide trial service in Omaha, Nebraska,[70] "without even questioning the fact that a technical trial was necessary," notwithstanding similar arguments raised there.[71] With regard to PRCTA's argument that PRTC intends its video dialtone facilities to be permanent because they will be multipurpose, PRTC argues that the development of integrated facilities is one of the purposes of the Commission's video dialtone policies and is not a legitimate reason to reject its application.[72] PRTC asserts that the Commission has rejected arguments that applications should be considered proposals for permanent service based on the size of proposed trials and the facilities to be constructed.[73] PRTC argues that its plans to offer video dialtone services to its own business offices and a number of schools should not take its proposal outside the realm of a trial system.[74] Finally, PRTC asserts that its intentions to conduct a technical trial are clear because it proposes to pass only 250 homes for a period not to exceed one year.[75] If, after the trial, it decides to deploy video dialtone services on a permanent, commercial basis, PRTC states that it will be required to submit a new Section 214 application.

Discussion

22. The Communications Act of 1934, as amended, requires the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide" communications infrastructure.[76] The Commission also has a mandate under the Act to encourage technological innovation in communications and to expedite the introduction of new technology subject to other public interest considerations.[77] Significantly, in the *Second Report and Order*, the Commission found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill its goal of promoting efficient investment in the national telecommunications infrastructure.[78]

23. We conclude that PRTC's application is a *bona fide* proposal for a technical trial of video dialtone facilities and service for several reasons. First, and most compelling, PRTC has requested authority to conduct a trial for only one year. Trials by their very nature are limited in time as well as in scope. Second, PRTC proposes to pass only 250 homes, 18 public schools, and 12 office buildings during its trial. Third, PRTC proposes to test and use ADSL and FTTC facilities for the provision of its video dialtone service. At this point, neither transport system is widely used for the delivery of video programming.[79] Indeed, the Commission has already explicitly concluded that the public interest is served by permitting trials of ADSL technology.[80] PRTC's request that the trial start 180 days after authorization is denied because the trial will not officially commence until the network is operational and video dialtone service is available to at least one end-user subscriber.[81]

24. We also reject petitioners' arguments that PRTC's application should be considered permanent in nature because of the size of investment PRTC proposes and the range of services it may offer over the network to a variety of end-users.[82] Under the circumstances, we find PRTC's proposed investment for this trial reasonable. PRTC indicates that it has approved a construction budget of $1.25

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[64] PRCTA Petition at 3; Caguas Petition at 2.
[65] PRCTA Petition at 3 (quoting PRTC Application at 2, 8); Caguas Petition at 2.
[66] Caguas Petition at 5; PRCTA Petition at 9.
[67] *Id.*
[68] PRCTA Petition at 6-7; Caguas Petition at 4.
[69] Caguas Petition at 4; PRCTA Petition at 7.
[70] U S WEST, Inc., File No. W-P-C-6868 (Section 214 application to offer trial video dialtone service in Omaha, NE).
[71] PRTC Opposition at 10.
[72] *Id.* at 10-11.
[73] *Id.* at 11 (citing U S WEST, Inc., 9 FCC Rcd 184, 188 (1993)).
[74] *Id.* at 11.
[75] *Id.* at 12.
[76] 47 U.S.C. § 151.
[77] 47 U.S.C. §§ 151, 157, 218.
[78] 7 FCC Rcd at 5836, para. 105; *see VDT Recon Order* at 5, para. 3.
[79] We disagree with petitioners' argument that ADSL and FTTC systems have already been tested extensively. To date, the Commission has only approved two ADSL video dialtone trials and one FTTC video dialtone trial. *See* The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313 (1993) (Arlington, VA ADSL trial passing 400 homes); Rochester Tel. Corp., 9 FCC Rcd 2285 (1994) (ADSL and hybrid fiber-coaxial trial passing 120 homes); U S WEST Communications, Inc., 9 FCC Rcd 184 (1993) (Omaha, NE hybrid FTTC trial involving 2,500 homes in a technical trial and a market trial passing up to 60,000 homes).
[80] *See* The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd at 2315, para. 9; Rochester Tel. Corp., 9 FCC Rcd at 2286-87, para. 14; *see also Second Report and Order*, 7 FCC Rcd at 5787, para. 9.
[81] *See infra* Section V, para. 53.
[82] In order to prevent the cross-subsidization of regulated video dialtone service by regulated voice service, we impose subsidiary accounting and cost assignment requirements. *See infra* para. 41.

billion for the next five years for network modernization.[83] Based on information in the record, PRTC's expenditure for this trial would amount to less than 0.2 percent of its total network modernization budget. Petitioners' unsupported assertion that PRTC's application should be considered permanent in nature because of PRTC's proposed investment is not persuasive. Furthermore, we believe that a network that is capable of handling voice, data, and video services fulfills the Commission's goal of promoting efficient investment in an advanced telecommunications infrastructure. Moreover, we find that the public interest is served when carriers test a variety of services on a variety of end-users. By serving different types of end-users, such as business, educational, or residential subscribers, PRTC may be able to ascertain the different technical requirements of different user groups.

3. Sufficiency of Application

Pleadings

25. Petitioners contend that PRTC's application should be rejected because it is missing important system information and lacks the level of specificity required by Section 214 and Part 63 of our rules.[84] For example, petitioners state that the application does not indicate the number of subscribers to be passed by its video dialtone network, nor does it estimate what the penetration rate will be.[85] Cable Systems USA claims that the application does not indicate how many subscribers will be served in each office building passed by the network nor the types of services that these end-users would need or use.[86] In a footnote to its petition, PRCTA alleges that PRTC is engaging in "electronic redlining," that is, it is proposing to serve only wealthy, high income communities during its trial.[87]

26. PRTC maintains that the level of information contained in its application is comparable to the level of information contained in applications the Commission has granted.[88] PRTC states that, contrary to petitioners' assertions, its application clearly indicates the number of end-users that will be passed by its video dialtone network and that the business offices that will be served are its own.[89]

Discussion

27. As noted above, "a trial [application for video dialtone service], by definition, is not generally susceptible to the same level of precision" as an application for permanent video dialtone service.[90] We conclude that PRTC has provided the Commission with sufficient information regarding its proposed video dialtone trial for the Commission to evaluate adequately the proposed one-year trial. Notwithstanding petitioners' claims, PRTC's application clearly states the number of homes it intends to pass. Because PRTC requests permission to conduct a limited technical trial, we find that the system information PRTC has provided is adequate for us to evaluate properly whether the public convenience and necessity will be served by its deployment of video dialtone facilities. Furthermore, PRCTA's claim of electronic redlining is unpersuasive because trials by their nature are limited in scope.[91] We believe that telephone companies that are conducting technical trials of video dialtone systems should have the flexibility to decide where they will test their technology.

4. Ownership of the Puerto Rico Telephone Company

Pleadings

28. Several petitioners argue that the incentive and opportunity exists for anticompetitive behavior by PRTC. These petitioners contend that the Commonwealth of Puerto Rico owns PRTC through the Puerto Rico Telephone Authority, and cannot reasonably be expected to compete fairly against the cable operators it franchises and regulates through the Puerto Rico Public Service Commission (PSC).[92] Petitioners state that the PSC controls the ability of cable operators to offer voice, data, and other telecommunications services in competition with PRTC.[93] According to the petitioners, there is evidence that the PSC has "already taken anticompetitive action against the cable operators serving Puerto Rico.[94] PRCTA alleges that by attempting to impose rate regulation on certain levels of cable service in an area where federal law had preempted regulation of these rates, the PSC had acted in an anticompetitive way.[95] Therefore, petitioners urge the Commission to impose structural separation requirements on PRTC's proposed provision of video dialtone service.[96]

29. PRTC asserts that petitioners' speculation about possible anticompetitive conduct by the Commonwealth or by PRTC is legally and factually unsupported.[97] PRTC maintains that the factual premise of petitioners' theory is wrong -- neither PRTC nor the government of Puerto Rico is competing with cable operators.[98] Rather, PRTC argues, it has proposed to provide a common carrier "pipeline" through which video programmers will offer competitive video services to end-users. Moreover, PRTC contends that

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[83] PRTC *Ex Parte* Letter at 2, 5.

[84] *See* Cable Systems USA Petition at 2; PRCTA Petition at 17; Caguas Petition at 8.

[85] Cable Systems USA Petition at 3; Caguas Petition at 5; PRCTA Petition at 9.

[86] Cable Systems USA Petition at 4-5.

[87] PRCTA Petition at 14 n.37.

[88] *See, e.g.*, PRTC Opposition at 5.

[89] PRTC Opposition at 3 (citing Application at 2, 6).

[90] New York Tel. Co., 8 FCC Rcd at 4330, para. 26; *see* U S WEST Communications, Inc., 9 FCC Rcd at 188, n.57.

[91] Several organizations have raised the issue of electronic redlining generally, and the Commission is currently carefully considering the issue in a separate proceeding. Petition for Rulemaking to Adapt the Section 214 Process to the Construction of Video Dialtone Facilities and Petition for Relief of the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, National Council of La Raza, RM-8491 (Public Notice, DA 94-777, July 14, 1994).

[92] PRCTA Petition at 10; Caguas Petition at 6; Century Reply at 2. Century argues that PRTC's claim that it is not owned by the Commonwealth but by the Puerto Rico Telephone Authority is inconsistent with its position that it is exempt from FCC filing fees because it is a "government entity." Century Reply at 4 (quoting PRTC Transmittal Letter Accompanying Section 214 Application (April 13, 1994)).

[93] PRCTA Petition at 11; Caguas Petition at 7.

[94] PRCTA Reply at 2.

[95] *Id.* at 2-3 (quoting Reexamination of the Effective Competition Standard for the Regulations of Cable Television Basic Service Rates, 6 FCC Rcd 4545, 4557 n.72 (1991)).

[96] *See* PRCTA Petition at 12; PRCTA Reply at 2.

[97] PRTC Opposition at 19.

[98] *Id.* at 17.

even if it were competing with cable operators, its status as a government-owned company would not be a reason to deny its application.[99] PRTC asserts that there is precedent establishing that governments may own utilities, and that those government-owned utilities may compete with privately-owned utilities.[100] According to PRTC, the Commission has granted licenses to government-owned entities in services in which competition with privately-owned licensees is likely.[101] In particular, PRTC argues that in another proceeding in Puerto Rico, the Commission rejected the argument that a government-owned applicant would have an unfair competitive advantage in competing with private operators in the same service.[102]

Discussion

30. We conclude that the Commonwealth's ownership of PRTC does not require us to reject the application. Petitioners' contentions that this relationship creates a danger of anticompetitive behavior are speculative. Even though the PSC is a government agency and the PRTC is a government-owned corporation, they are separate, independent entities. The PSC is a regulatory body with commissioners that are appointed by the governor with the consent of the Commonwealth's Senate. The PRTC is a wholly-owned unit of the Puerto Rico Telephone Authority that has its own board of directors and corporate officers.[103]

31. PRCTA cites a Commission order stating that the PSC misunderstood federal policy that preempted the PSC's regulation of cable rates, and therefore, rendered the PSC's rate regulation improper. In the Cable Order, the Commission stated that the PSC's regulation of all levels of cable service was based on the misinterpretation that the Commission would change federal policy and permit rate regulation of all services offered by cable operators.[104] We disagree with PRCTA that the PSC's misinterpretation of federal policy is evidence of actual anticompetitive intent directed at cable operators. The Commission did not, in that order, characterize the PSC's action in that manner, and we decline to do so here.

32. In another proceeding, the Commission determined that the domestic and international Puerto Rico off-island markets should be opened to competition, and that PRTC should be allowed to enter these markets, subject to certain conditions designed to ensure fair competition.[105] The Commission concluded that PRTC should not be precluded from entering off-island markets merely because of its government-owned status.[106] Furthermore, the Commission declined to impose a structural separation requirement on PRTC's off-island activities, opting instead to rely on non-structural safeguards to ensure fair competition.[107] The Commission reasoned that PRTC's entry into off-island markets, subject to certain safeguards, would substantially increase competition in these markets and improve service to the public.[108] Here, we conclude that granting PRTC's application is consistent with the Commission's reasoning in the *Puerto Rico Off-Island Order*. Like the Commission in the *Puerto Rico Off-Island Order*, we believe that a structural separation safeguard is unwarranted for PRTC's provision of video dialtone service on a limited trial basis.[109] Rather, we impose certain conditions on PRTC, designed to protect the interests of interstate telephone ratepayers, unaffiliated video programmers, and video dialtone subscribers.[110]

5. Cost and Cross-Subsidy Issues

Pleadings

33. Petitioners argue that PRTC's application is defective because it fails to provide adequate cost and revenue data. They argue that PRTC should be compelled to submit detailed cost allocation information, including cost data for outside plant facilities and its planned costing methodology.[111] PRCTA and Caguas contend that PRTC's $2.5 million cost estimate is too low when compared to previously authorized video dialtone trials of the same or shorter duration.[112] Petitioners allege that PRTC has omitted considerable costs from its application and exhibits.[113] According to Caguas and PRCTA, PRTC's application fails to account properly for the costs associated with the network upgrades that appear to be part of its video dialtone

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[99] *Id.* at 18.

[100] *Id.* (citing *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938)).

[101] *Id.* (citing RCA Global Communications, Inc., 56 FCC 2d 660, 689 (1975)).

[102] *Id.* at 19 (citing Commonwealth of Puerto Rico, Puerto Rico Communications Authority, Mimeo No. 6121, released Aug. 25, 1983, *cited in* Celcom Communications Corp., 61 RR 2d (P&F) 353, 357 n.26 (1986)).

[103] The rates and practices of PRTC are subject to approval by the Governing Board of PRTA. *See* 27 L.P.R.A. § 407. The Governing Board consists of seven members -- five members appointed by the governor with the advice and consent of the Commonwealth Senate, and two members elected by an island-wide referendum. 27 L.P.R.A. § 404.

[104] *See* Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 6 FCC Rcd 4545, 4557 n.72 (1991).

[105] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd 6600 (1987) (*Puerto Rico Off-Island Order*), *aff'd on recon.*, 8 FCC Rcd 63 (1992).

[106] *Puerto Rico Off-Island Order*, 2 FCC Rcd at 6613, para. 74.

[107] *Id.* at 6610, para. 62, 6613, para. 76. The Commission held that the costs of structural separation on PRTC would outweigh the benefits that the public would reap as a result of increased competition in the off-island market. *Id.* at 6610, para. 63.

[108] *Id.* at 6613, para. 74.

[109] In the *VDT Recon Order*, the Commission affirmed its decision to impose non-structural safeguards on telephone common carriers offering level two or video-related enhanced services on a video dialtone platform. *VDT Recon Order* at 108, paras. 231-232.

[110] We note that several remedies exist under federal law for parties alleging injury because of anticompetitive behavior. *See, e.g.*, 47 U.S.C. § 208 (creates formal complaint process under the Communications Act); 15 U.S.C. § 15 (creates private right of action for persons injured by anticompetitive conduct); 15 U.S.C. § 21 (empowers the Commission to enforce the provisions of the antitrust laws).

[111] Caguas Petition at 10; PRCTA Petition at 21.

[112] Caguas Petition at 8; PRCTA Petition at 17.

[113] Caguas Petition at 8; PRCTA Petition at 18. Cable Systems USA argues that PRTC's application does not provide any information regarding annual operating costs such as administrative, customer service, marketing, and market research expenses. Cable Systems USA Petition at 8.

plans.[114] In connection with PRTC's FTTC facilities, Cable Systems USA contends that PRTC does not allocate any of the costs of existing fiber and FTTC facilities to the video dialtone trial.[115] In addition, petitioners contend that the application does not indicate how much new plant and equipment PRTC envisions, and whether PRTC has properly accounted for the associated costs.[116]

34. Cable Systems USA asserts that PRTC's proposed investment cost per subscriber or entity passed are substantial and unprecedented relative to its net income and to the costs presented by other video dialtone applicants.[117] Cable Systems USA provides an analysis purporting to show that PRTC's investment cost per subscriber, using the figures provided by PRTC that exclude the costs of existing FTTC facilities, is approximately $9,000 per subscriber.[118] Cable Systems USA claims that investment cost per subscriber in other video dialtone trials are in the $2,000 to $4,000 range per subscriber.[119] Cable Systems USA states that when PRTC's investment costs are adjusted to reflect "a reasonable estimate of the costs of providing FTTC", the investment cost per subscriber increases to $10,500 per subscriber.[120] Cable Systems USA argues that based on a rough net cash flow analysis, PRTC's investment would produce a negative net present value and would not break even at any time during a ten-year period.[121] Finally, Cable Systems USA contends that PRTC should be required to provide an estimate of the rates end-users would be willing to pay in order for the Commission to determine whether PRTC's proposal is economically justified.

35. Petitioners also contend that PRTC has the ability to cross-subsidize its video dialtone service by having its costs borne by its regulated telephone ratepayers or by the taxpayers of Puerto Rico.[122] PRCTA and Caguas claim that PRTC could cross-subsidize its video dialtone enterprise without assigning any of its video dialtone costs to the regulated rate base by having Puerto Rican taxpayers "fund the vdt [video dialtone] venture" because the taxpayers are PRTC's shareholders.[123] According to Caguas and the PRCTA, safeguards to prevent this type of cross-subsidization do not currently exist.[124] Therefore, petitioners urge the Commission to require PRTC to establish a separate subsidiary with separate accounting records for its video dialtone operations.[125]

36. With regard to cost issues, PRTC maintains that the petitioners seek to impose a level of specificity on its application that the Commission has thus far refused to impose on any other video dialtone trial application.[126] PRTC claims that the specificity of the cost data contained in its application is comparable to the data provided in applications that the Commission has granted. PRTC disputes petitioners' contentions that it should be compelled to identify the costs of existing facilities that will be used for video dialtone. PRTC states that consistent with previous trial authorizations, it will comply with the Commission's Part 32 accounting requirements by segregating the direct incremental cost of the basic platform into subsidiary accounting records.[127] PRTC contends that it is not required to submit detailed annual cost flows, net cash flow, or "break even" analyses because it seeks a limited trial authorization, and the Commission has declined to require such studies by trial applicants.[128]

37. PRTC claims that it cannot provide an estimate of prices that end-users would be willing to pay because it is not planning to charge programmer-customers or end-users for access to the video dialtone platform during the trial. With regard to petitioners' assertions that PRTC fails to provide cost information similar to that submitted by New Jersey Bell in its Dover Township and Florham Park, New Jersey applications, PRTC argues that the comparison is inapposite because New Jersey Bell had applied for permanent, commercial authorization.[129] Further, PRTC argues that the New Jersey Bell's applications should not be the measure by which all applications for video dialtone are considered.[130] Generally, PRTC challenges petitioners' comparisons of its trial proposal to other trial proposals as selective because PRTC proposes to pass only 250 residences, while U S WEST applied for authority to pass 10,000 homes and the Southern New England Telephone Company (SNET) sought and obtained permission to pass 1,600 homes.[131]

38. Finally, PRTC contends that a separate subsidiary requirement is unnecessary.[132] According to PRTC, the Commission concluded in the *Second Report and Order* that existing safeguards against cross-subsidization should prevent potential anticompetitive conduct by carriers providing video dialtone. PRTC maintains that petitioners have failed to present any facts supporting their theory that

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[114] Caguas Petition at 8; PRCTA Petition at 18. PRCTA asserts that PRTC may have omitted certain costs in connection with its installation of the FLX Platform because it notes that New Jersey Bell Telephone Co. proposed the same FLX Platform for its Dover Township and Florham Park, New Jersey systems and provided "seemingly different cost categories." PRCTA Petition at 18.

[115] Cable Systems USA Petition at 5.

[116] Caguas Petition at 9; PRCTA Petition at 19.

[117] Cable Systems USA Petition at 7.

[118] *Id.*

[119] *Id.* at 8.

[120] *Id.*

[121] *Id.* at 11. Cable Systems USA states that its financial analysis is rough because not only has PRTC failed to do its own net cash flow analysis, but its application does not provide the cost and revenue data that would be necessary to perform such an analysis. *Id.* at 10-11, 12.

[122] Caguas Petition at 11; Century Reply at 5; PRCTA Petition at 24.

[123] PRCTA Petition at 26-27; Caguas Petition at 12.

[124] PRCTA Petition at 26; Caguas Petition at 12.

[125] PRCTA Petition at 12, 27; Caguas Petition at 12.

[126] PRTC Opposition at 5.

[127] *Id.* at 5-6 (citing The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313, 2316, para. 13 (1993)); *see* Application at 8.

[128] PRTC Opposition at 6-7.

[129] *Id.* at 7.

[130] *Id.*

[131] *Id.* at 8. PRTC contends that petitioners exaggerate the geographic scope and cost of its trial. According to PRTC, the geographic scope of its trial "does not add much incremental cost" because the 250 homes passed are all located in the San Juan metropolitan area. *Id.* PRTC claims that service to outlying areas, which consists of service to its business offices and the public schools, will be made possible by existing network facilities. *Id.*

[132] *Id.* at 13-14.

cross-subsidization by regulated ratepayers will occur in spite of existing rules.[133] Moreover, PRTC claims that petitioners' contention that Commonwealth taxpayers will cross-subsidize the video dialtone trial is factually incorrect. PRTC states that contrary to PRCTA's claim, the sole shareholder of the PRTC is the Puerto Rico Telephone Authority (PRTA) and not the taxpayers of Puerto Rico.[134] PRTC asserts that neither the PRTC nor the PRTA are subsidized by taxpayers, but rather the PRTA is required to make payments to the Puerto Rican government "in lieu of paying regular taxes."[135] According to PRTC, the telephone company, through these payments, supports the Commonwealth's municipalities and its educational system.

Discussion

39. We find the information provided by PRTC to be a sufficient showing of economic justification for its video dialtone technical trial.[136] Petitioners ask the Commission to hold the application to a level of scrutiny and examination normally reserved for applications for commercial deployment of video dialtone service.[137] PRTC proposes to conduct a technical trial of video dialtone facilities involving 250 homes, 18 public schools, and 12 PRTC business offices. Due to the experimental, limited nature of PRTC's proposal, we find that it is in the public interest to subject this trial application to a less exacting level of scrutiny than would be applied to an application for permanent, commercial video dialtone service.[138]

40. With regard to petitioners' arguments concerning PRTC's investment cost per subscriber passed and potential cross-subsidization, we emphasize that PRTC has requested permission to conduct a 250-home, one-year video dialtone trial, and that we will impose various conditions on PRTC's authorization designed to protect interstate telephone ratepayers and video dialtone subscribers.

41. To ensure that video dialtone costs are not borne by ratepayers of other regulated interstate services, we will require PRTC to segregate all costs incurred in providing trial video dialtone service, including development costs and expenses, into Part 32 subsidiary accounting records and to assign these costs directly to the video dialtone trial. These costs should include the costs of any fiber or FTTC facilities, including interoffice fiber, used for the provision of video dialtone service. If these costs are not recovered from future video dialtone services, they must be borne by the PRTC and its sole shareholder, PRTA, rather than the ratepayers of other regulated services.[139] We also require PRTC to establish subsidiary accounting records to capture the investments and expenses that are shared between video dialtone and and the provision of other services.[140] In addition, accurate copies of summaries of the subsidiary accounting records shall be submitted to the Commission on a quarterly basis.[141]

42. The costs of non-common carrier and enhanced services, as well as video customer premises equipment (CPE) offered during the trial must be accounted for in accordance with Part 32 and Part 64 of the rules.[142] We require that, to the extent the accounting treatment of non-regulated components of the video dialtone trial is not already covered by PRTC's cost allocation manual (CAM), the carrier must revise its manual to show how it intends to allocate costs of such components between regulated and non-regulated activities for the duration of the trial.[143] Any necessary revisions must be filed within thirty days after release of this Order, and at least sixty days before providing non-regulated services related to video dialtone. At a minimum, in its submission, we require PRTC to list all accounts affected by its provision of non-regulated services associated with its video dialtone trial, and also describe those services. All temporary CAM revisions related to the trial will be subject to public comment and Commission scrutiny. PRTC must file permanent revisions if and when it decides, and is authorized, to offer commercial video dialtone services. We emphasize that our decision here, and the conditions we attach to it, are without prejudice to and in no way constrain any action that the Commission may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

43. We reject petitioners' request that the Commission compel PRTC to establish a separate corporate subsidiary for its video dialtone operations. In the *Second Report and Order* and *VDT Recon Order*, the Commission concluded that existing safeguards against discrimination and cross-subsidization, in conjunction with the additional protection of a nondiscriminatory basic video dialtone platform, should effectively protect against potential anticompetitive conduct by local telephone companies providing video dialtone.[144] Petitioners have failed to provide any persuasive basis for imposing structural separation requirements on PRTC's limited trial. We believe that, under the circumstances of this trial, existing safeguards and the obligation of a nondiscriminatory basic common carrier platform will prevent PRTC from engaging in anticompetitive behavior.

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[133] *Id.* at 14.

[134] *See* PRTC *Ex Parte* Letter at 3 (Sept. 27, 1994).

[135] PRTC Opposition at 14.

[136] *See Century Federal, Inc. v. FCC*, 846 F.2d 1479, 1481 (D.C. Cir. 1988) (held that it was entirely within the Commission's discretion to accept a minimal showing of financial justification for new construction under Section 214).

[137] *See, e.g.*, U S WEST Communications, Inc., 9 FCC Rcd at 188, n.57.

[138] We therefore deny Cable Systems USA's request that PRTC be required to provide an estimate of the rates subscribers would be willing to pay for video services. PRTC has asked the Commission for authority to conduct a limited technical trial, not a market trial.

[139] *See, e.g.*, The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd at 2316, para. 13; New York Tel. Co., 8 FCC Rcd at 4329, para. 23.

[140] *See VDT Recon Order* at 83, para. 173.

[141] *See id.* Copies of accounting records should be sent to the Chief, Accounting and Audits Division, Common Carrier Bureau. We note that these requirements are wholly consistent with the approach taken in other video dialtone trial authorizations. *See, e.g.*, The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313 (1993); New York Tel. Co., 8 FCC Rcd 4325 (1993); U S WEST Communications, Inc., 9 FCC Rcd 184 (1993); The Southern New England Tel. Co., FCC 94-297 (released Nov. 22, 1994).

[142] *See* 47 C.F.R. § 63.54(d)(2).

[143] *See* 47 C.F.R. § 64.903.

[144] *Second Report and Order*, 7 FCC Rcd at 5827, para. 89; *VDT Recon Order* at 107, para. 230.

C. Premature Construction

Pleadings

44. Petitioners claim that PRTC may have violated Section 214 by constructing FTTC equipment and facilities necessary for its video dialtone service before obtaining Commission authorization.[145] The petitioners urge the Commission to investigate PRTC's construction activities, and if appropriate, dismiss PRTC's application. According to Caguas and PRCTA, the Commonwealth recently awarded contracts for 325,000 lines of EWSD switching equipment, including seven EWSD host switches and 90 remote systems, "which will enable 'telephone subscribers to carry digital signals such as voice, data and video simultaneously over the existing copper-wire public network.'"[146] In addition, petitioners allege that PRTC has violated Section 214 by installing the FLX Platform which according to the trade press, is "a video dialtone platform."[147] Finally, PRCTA questions PRTC's request for a six-month delay before its Section 214 authority is effective given that it has already installed fiber facilities and equipment.[148]

45. PRTC denies that it has begun constructing video dialtone facilities in violation of Section 214.[149] PRTC states that contrary to PRCTA's suggestions, it is using FTTC facilities and the FLX Platform for the provision of voice telephony.[150] PRTC states that its FTTC deployment plans were formulated "long before" the Commission's video dialtone policy was considered.[151] PRTC contends that Cable Systems USA's contention that fiber, coaxial cable, host distribution terminals (HDTs), and optical network units (ONUs) have been deployed for the provision of video services is based on speculation. According to PRTC, these facilities and equipment are currently being used only for the provision of local exchange telephone service.[152] PRTC states that additional equipment, including headend equipment, receiver/demux for the HDT, hardware and software for the HDT, and optical splitters must be installed in order to provide video dialtone service.[153]

46. With regard to petitioners' contention that purchases of digital telecommunications switching equipment is evidence of premature construction, PRTC states that this equipment is being installed to replace first generation central office equipment "for the provision of services authorized by the FCC, and moreover, its capabilities to transport video are limited to what Integrated Services Digital Network ('ISDN') can support."[154] PRTC also states that it has commenced a five-year, $1.25 billion network modernization program that includes replacing copper plant with optical fiber facilities.[155] Finally, PRTC argues that it has requested a six-month period before the clock starts running on its technical trial in order to follow necessary procurement requirements for the purchase and deployment of necessary video transport equipment.[156]

Discussion

47. We conclude that PRTC has not violated Section 214 by deploying fiber optic and coaxial facilities and installing the FLX Platform to provide local exchange telephone service. Section 214(a) prohibits a carrier from constructing or extending a "new line," or from engaging in transmission over or by means of such a line, "unless and until there shall first have been obtained from the Commission" a certificate of public convenience and necessity.[157] The Act defines "line" as "a channel of communication established by use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels."[158]

48. Because local exchange telephone facilities almost always connect at some level with facilities dedicated to interexchange, interstate services, one could read Section 214 to require Commission certification before construction of any local exchange facilities. That reading, which would eviscerate the concept of purely intrastate facilities, has not been the Commission's practice, however. In *Kitchen v. Bell Telephone Co. of Pennsylvania*, the Commission found that no Section 214 authority was needed to construct a building to house switching equipment, stating that "clearly some division between interstate and intrastate authority must be made, and [what is proposed] is primarily, if not exclusively, related to an intrastate activity" under state jurisdiction.[159] In *Northwestern Telephone Systems, Inc.*, this Bureau held that a carrier can construct facilities for intrastate use without obtaining Section 214 certification, even if it plans further construction to allow for interstate use, "as long as the interstate use of the line does not occur prior to acquisition of necessary federal authority."[160]

49. The courts have determined that whether a facility is intrastate or interstate depends on the character of service for which it is used.[161] The record here indicates that, prior

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[145] Caguas Petition at 4-5; PRCTA Petition at 7-8; Cable Systems USA Petition at 6.

[146] PRCTA Petition at 7 (quoting "Siemens Stromberg-Carlson Wins Major EWSD Switch Upgrade Contracts in Puerto Rico," *PR Newswire*, March 29, 1994; "Puerto Ricans Get Up-to-Speed," *ISDN News*, April 12, 1994). An EWSD or "Electronic World Switch Digital" is a digital telecommunications switch manufactured by Siemens Stromberg-Carlson.

[147] Caguas Petition at 4; PRCTA Petition at 7 (quoting "BroadBand Technologies, Phillips Consumer Electronics and Compression Labs to Develop Interactive Broadband Video Solution," *Business Wire*, Aug. 2, 1993; Paul Worthington, "Dial M for Movie," *PC World*, Nov. 1993 at M33). In addition to unlawful construction of FTTC facilities, petitioners also assert that PRTC has omitted these "existing" costs from its application. *See* PRCTA Petition at 8.

[148] PRCTA Petition at 8 n.21.

[149] PRTC Opposition at 14.

[150] *Id.* at 15 (citing Declaration of Roberto Correa at para. 3); PRTC *Ex Parte* Letter at 2.

[151] PRTC *Ex Parte* Letter at 2.

[152] PRTC *Ex Parte* Letter at 2.

[153] PRTC Opposition at 15 (citing Declaration of Roberto Correa at para. 4); PRTC *Ex Parte* Letter at 2-3 (providing a list of the equipment needed to provide video dialtone service).

[154] PRTC Opposition at 16 (citing Declaration of Roberto Correa at para. 3).

[155] PRTC *Ex Parte* Letter at 1-2.

[156] PRTC Opposition at 16 (citing Application at 10).

[157] 47 U.S.C. § 214(a).

[158] *Id.*

[159] 31 FCC 2d 604, 608 (1971), *aff'd*, 464 F.2d 801 (D.C. Cir. 1972).

[160] 5 FCC Rcd 876, 877 (Com. Car. Bur. 1990).

[161] *See General Tel. Co. of California v. FCC*, 413 F.2d 390 (D.C. Cir. 1969); *Kitchen*, 31 FCC 2d at 608; *Northwestern Tel. Sys.*, 5 FCC Rcd at 877.

to approval of PRTC's video dialtone application, intrastate telephone service will constitute the primary, if not the exclusive, use of the facilities constructed by PRTC.[162] Much like the building at issue in *Kitchen*, the fiber and coaxial construction that PRTC will use for local telephone service is primarily, if not exclusively, intrastate. In addition, the fiber and coaxial facilities and equipment constructed by PRTC are necessary for the provision of local exchange telephone service. We conclude, therefore, that installation of this equipment is not subject to the certification requirement of Section 214. No Section 214 certification is required because the record shows that the facilities that PRTC has constructed to date are being used to provide local exchange service. These facilities may not be used to provide video dialtone until PRTC receives Section 214 approval and deploys additional equipment necessary to provide such service.

50. PRTC is not required to obtain Section 214 authorization until it begins to construct or install the components of its network to be used exclusively to provide interstate video dialtone service.[163] Before adding video dialtone facilities unrelated to the provision of local exchange service, however, PRTC must obtain Section 214 certification, as the addition of video dialtone capability will alter the jurisdictional character of service provided over these facilities. We emphasize that this conclusion does not in any way restrict or impair the Commission's jurisdiction to regulate any interstate telecommunications services, such as interstate access, that may be provided over those facilities once constructed.

51. We also find that the EWSD digital switches and associated equipment have been purchased to upgrade PRTC's network and will be used primarily, if not exclusively, for the provision of local exchange service. PRTC represents that the new switches were purchased to replace technologically obsolete central office facilities used to provide local exchange and exchange access services. Therefore, based on the record and *Kitchen* decision, we conclude that the equipment and facilities PRTC has constructed or installed to date are for intrastate telecommunications services, and, consequently, that this construction does not violate Section 214 of the Act because prior Commission approval for the construction of intrastate facilities is not required.[164]

IV. CONCLUSION

52. At this stage of video dialtone's deployment, we believe that it is important to encourage carriers to engage in technical and market trials of video dialtone facilities and service provided over an advanced, broadband telecommunications infrastructure. Through an advanced infrastructure, we envision the eventual availability of a multitude of diverse video and information services. To achieve the Commission's goals, therefore, we may permit limited trials of video dialtone services, subject to conditions formulated to protect interstate telephone ratepayers. We conclude that this is wholly consistent with our mandate under the Communications Act, and particularly, under Section 214. In this case, PRTC will be introducing and testing a new service in Puerto Rico that potentially could be a viable competitor to entrenched cable television operators. We find that the potential public interest benefits of a limited, one-year trial of this size outweigh any possible risks, and therefore, we conclude that the public convenience and necessity will be served by permitting PRTC to conduct a one-year technical trial of video dialtone services, subject to certain conditions.

V. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and authority delegated to the Chief of the Common Carrier Bureau by Section 0.291(a) of the Commission's rules, 47 C.F.R. § 0.291(a), the Application of the Puerto Rico Telephone Company (File No. W-P-C-6949) IS GRANTED, and the applicant is authorized to construct and operate facilities and equipment to test new technologies for use in a video dialtone trial by passing 250 residences, 18 public schools, and 12 PRTC business offices for a period of one year from the date the system is operational and service is available to at least one end-user subscriber. We instruct PRTC to inform the Secretary of the Commission and the Chief of the Common Carrier Bureau, of the official start date of the trial.

54. IT IS FURTHER ORDERED, that grant of the application for the trial proposed herein IS SUBJECT TO the following CONDITIONS:

a) That PRTC inform participants in the trial, including both video programmer-customers and end-user subscribers, that PRTC is conducting a trial of video dialtone services, that the trial is limited to one year, and that PRTC may or may not offer video dialtone on a commercial basis after the conclusion of the trial.

b) That PRTC account for all costs associated with the trial, including development costs and expenses, in accordance with Part 32 of the Commission's Rules. PRTC must also create two sets of subsidiary accounting records: one to capture the revenues (if any), investments, and expenses wholly dedicated to the provision of video dialtone service, and the other to capture any revenues, investments, and expenses that are shared between video dialtone and the provision of other services. PRTC is also required to file summaries of its subsidiary accounting records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Copies of these summaries must also be served on the Chief, Accounting and Audits Division, Common Carrier Bureau.

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[162] Declaration of Roberto Correa, PRTC, at para. 3 (attached to PRTC Opposition); PRTC *Ex Parte* Letter at 2.

[163] According to PRTC, additional equipment, such as broadband HDTs and ONUs and a video switch, must be installed before the network will able to transport video signals. *See* PRTC *Ex Parte* Letter at 2-3 (listing equipment necessary for the provision of video dialtone service). We note that the Commission only has jurisdiction over interstate video dialtone facilities and services. *VDT Recon Order* at 58-59, paras. 121-123.

[164] *See* 47 U.S.C. § 153(v).

c) That PRTC file any necessary revisions to its Cost Allocation Manual within thirty (30) days after release of this Order, and sixty (60) days before providing non-regulated services related to video dialtone. PRTC must also list all accounts affected by its provision of non-regulated services associated with the video dialtone trial, and describe those services.

d) That PRTC not determine how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering" of the programming or the price, terms, or conditions on which the programming is offered to subscribers, absent prior Commission approval. This authorization does not permit PRTC, either directly or indirectly through an affiliate, to provide video programming directly to its subscribers.

e) That PRTC report to the Chief, Common Carrier Bureau (with copies to the Chiefs of the Policy and Program Planning Division and the Domestic Facilities Division) within thirty (30) days of becoming aware of a capacity shortfall, or within five (5) days of denying a video programmer access to the platform due to capacity limitations, whichever occurs first. Should PRTC conclude that expansion of the platform's capacity for the trial is not technically feasible or economically reasonable, it must, at that time, explain in detail the basis for its determination.

f) That PRTC comply prospectively with any changes in our rules or any new rules that result from video dialtone or any other applicable rulemakings.

g) That PRTC submit to the Chief of the Common Carrier Bureau, six months after commencement of the trial and within sixty (60) days after the end of the trial, a written report. The report must, among other things:

1) identify the capacity allocated to each video programmer-customer and the identity of the programmer-customer;

2) include a statement from each video programmer or other service provider using PRTC's services stating whether that programmer-customer/service provider believes it has been discriminated against by PRTC in any manner;

3) include a completed survey of end-users designed to evaluate whether end-users had nondiscriminatory access to each programmer and programming offered over the platforms. The survey should also include an evaluation by end-users of the quality of the video dialtone service offered;

4) describe and evaluate the video dialtone technologies used during the trial. PRTC must include information on the video switch(es) and other components of the video dialtone systems, the operation of video-on-demand, the quality of the video, the methods of accessing the platforms, and the digital technology incorporated into the network and its impact on capacity;

5) detail the costs, both direct and common, PRTC has allocated to the trial, separated into subsidiary accounting records; and,

6) include any published commentary of which PRTC is aware regarding the trial.

55. Pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), the grant of PRTC's application to conduct a trial of video dialtone service is subject from the date of release of this grant to the conditions contained herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, and pricing issues. Failure of Puerto Rico Telephone Company to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-8

In the Matter of	)
	)
Request by Pacific Telesis Group and	)
PacTel Corporation for a Waiver of	)
Section 99.204 of the Commission's Rules	)

ORDER

Adopted: January 14, 1994 Released: January 18, 1994

By the Commission: Chairman Hundt not participating.

1. On December 16, 1993, Pacific Telesis Group ("PTG"), on behalf of its subsidiaries Pacific Bell and Nevada Bell ("the Bells"), and PacTel Corporation ("PacTel") filed a request for a "temporary waiver" of Section 99.204 of the Commission's Rules.

2. PTG is a publicly traded holding company of which the Bells and PacTel are both wholly owned subsidiaries. The Bells provide local exchange and other communications services in California and Nevada. PacTel is the parent of numerous operating subsidiaries that provide cellular and other wireless communications services. In December 1992, the PTG Board of Directors approved a plan to separate or "spin-off" PacTel from PTG by distributing PTG's shares in PacTel to PTG shareholders. According to PTG and PacTel, once this plan is fully effectuated, PacTel would be a publicly traded company sharing no common officers, directors, employees or assets with either PTG or the Bells.

3. On November 2, 1993, the California Public Utilities Commission approved the separation of PacTel from PTG.[1] In December 1993, as the first step of the separation, PTG completed an initial public offering of 68.5 million shares of PacTel stock (representing approximately 14 percent of PacTel's now outstanding shares). PTG has stated that, subject to final approval by its Board of Directors, it plans to complete the spin-off process by distributing the remaining 424 million shares of PacTel stock to PTG's existing shareholders.

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[1] This Commission has also granted its consent to the pro forma transfers of control of the radio licenses held by PacTel. See FCC Public Notice No. CL-93-63, released March 3, 1993.

PTG and PacTel state that their investment advisors have recommended that a period of several months be allowed to pass between the initial public offering of PacTel stock and the ultimate separation to ensure that the trading market for the PacTel stock has stabilized so as to be able to absorb the increase in trading that is expected to result from the spin-off. Waiver Request at p. 5. PTG and PacTel plan for the spin-off to occur no later than June 9, 1994. Ibid.

4. In our Second Report and Order in Gen. Docket No. 90-314, FCC 93-451 (released October 22, 1993), the Commission set forth in Part 99 of its rules new ownership and attribution rules for licensees in the Personal Communications Service ("PCS"). With respect to so-called "broadband" PCS, Section 99.204 of the Commission's Rules states, in pertinent part, that "[e]ntities that have an attributable interest of 20 percent of more in an entity that is a licensee in the Domestic Public Cellular Radio Telecommunications Service shall not be eligible for assignment of more than one 10 MHz frequency block in any PCS service area where its cellular geographic service area (CGSA) includes 10 or more percent of the population of the PCS service area ...."[2] Further, the Commission has proposed the use of auction for licensing PCS. Pursuant to the statutory requirement that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing," the Commission has proposed that applicants demonstrate their eligibility to bid in the application they will file prior to the auction. See Auction NPRM at paras. 96-97. We are also considering in that proceeding how long prior to the auction an application should be filed, and have tentatively concluded that applicants should be notified whether their applications are acceptable for filing at least 45 days prior to the auction. Id. at para. 101.

5. Section 6002(d)(2)(B) of Pub. L. 103-66 requires the Commission to commence issuing licenses and permits in PCS on or before May 7, 1994. PTG and PacTel note that the Commission has not yet specified how it will meet this deadline, so it is possible that broadband PCS licenses on which PTG may wish to bid could be auctioned prior to May 7, 1994. In that case, PTG and PacTel fear that applications for those licenses, accompanied by eligibility certifications, might have to be filed as early as March 1994, only 3 months

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[2] Pending before the Commission are numerous petitions for reconsideration or clarification of the Second Report and Order in Gen. Docket No. 90-314 that request that cellular carriers be permitted to bid on and win PCS licenses that they would be prohibited by the cellular/PCS cross-ownership rules from holding, provided that they come into compliance with the rules at some time prior to commencing operations. This issue has also been raised in comments on our Notice of Proposed Rulemaking in PP Docket No. 93-253, FCC 93-455 (released October 12, 1993) (the "Auction NPRM"). Though a decision with respect to cellular bidding eligibility may moot the waiver request currently before us, we believe that it is appropriate to decide that question in the context of these broader rulemaking proceedings and not in this adjudication.

following the PacTel initial public offering and prior to the date that PacTel and PTG have planned for their separation.

6. PTG and PacTel are concerned that the cellular eligibility restrictions contained in Section 99.204, combined with the operation of the proposed auction application rules, could alternatively preclude PTG and PacTel from applying for licenses which they will be eligible to hold once the separation is complete or force them to effectuate the separation prematurely, possibly disrupting the market for PacTel stock and causing significant expenses to be incurred in providing shareholders with additional information to secure necessary approval from the Securities and Exchange Commission ("SEC").[3] They request a temporary waiver of Section 99.204 of the Commission's Rules until June 9, 1994, to permit PTG and/or the Bells to apply for PCS licenses that the cellular/PCS cross-ownership rules may prohibit them from holding absent their separation from PacTel.[4] The companies pledge that the PacTel spin-off will be completed no later than the first auction for broadband PCS licenses.

7. A waiver of the Commission's Rules is appropriate "only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." Northeast Cellular Telephone Co., L.P. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969); Fleet Call, Inc., 6 FCC Rcd 1533 (1991). We believe that PTG and PacTel have satisfied that burden in this case so as to justify a limited partial waiver of Section 99.204. The circumstances giving rise to this waiver request were unique, unforeseeable and beyond the control of PTG and PacTel. PTG's Board of Directors adopted the corporate strategy leading to the separation of PacTel from PTG well before enactment of the legislation that authorized the Commission to use a system of competitive bidding for spectrum licensing and set a deadline for commencement of PCS licensing. Indeed, if the legislation had been enacted a few months later, the requested waiver likely would not be needed. Corporate action that initiated the proposed spin-off was also begun prior to the Commission's adoption of both Section 99.204 and the proposed auction application processing rules. To our knowledge, no other potential PCS applicant has sought and received regulatory approval for, and is currently in the process of, divestiture of

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[3] According to PTG, to receive SEC approval of a spin-off of PacTel less than four months after the initial public offering of PacTel stock, an "Information Statement" would have to be prepared and mailed to all current PTG shareholders. PTG estimates that it would incur expenses of between three and five million dollars to prepare and mail such a statement to its shareholders. Waiver Request at p. 5.

[4] PTG and PacTel also state that the requested waiver "will allow ... PacTel to bid on the 10 MHZ spectrum blocks within its cellular serving areas, and ... PTG, or [the Bells] and PacTel to bid against one another for licenses outside PacTel's serving areas in the event the Commission begins the auction of broadband PCS licenses before June 9, 1994." Waiver Request at p. 1. We do not believe that a waiver of Section 99.204 will affect the ability of PTG, PacTel or the Bells to engage in these bidding activities.

its cellular operations to enable it to bid on more than 10 MHz of PCS spectrum. Thus, the circumstances giving rise to the PTG/PacTel request are unique. Further, grant of the requested waiver would not undermine the purposes underlying the cellular/PCS cross-ownership rules contained in Section 99.204, which are to foster broad participation in PCS while ensuring that cellular operators do not exert undue market power. PTG and PacTel have pledged that if they are not eligible to hold a particular PCS license on the date of the auction for that license, they will not bid on it. The waiver will simply permit PTG, the Bells and PacTel to preserve their opportunities to apply for certain PCS licenses that they may bid on only once the spin-off is completed. Thus, the waiver will in fact serve the dual purposes of Section 99.204 by permitting the requesting parties to participate in auctions for PCS licenses for which they will be eligible at the time of the auction while raising no additional danger of the exertion of undue market power by PacTel.

8. The few parties that have commented on the PTG/PacTel waiver request have not opposed it.[5] Some commenters, however, have taken issue with a statement in the request that the waiver "would not create a precedent for waivers to allow cellular entities to bid for cellular-ineligible PCS licenses, and if they win, decide to take steps to make themselves eligible." Waiver Request at p. 7. For example, McCaw Cellular Communications, Inc. and GTE Service Corporation argue that PTG and PacTel should not be afforded special treatment that will not be available to other cellular carriers.[6] The PTG/PacTel request is limited by the particular facts presented, and that the waiver is limited so as to permit PTG and PacTel merely to file applications for PCS licenses which they may be ineligible to hold if they were to continue as corporate affiliates. PTG and PacTel have not requested that they be permitted to actually place bids on licenses for which they are not eligible at the time of the auction, and by our decision today we do not authorize such action. We interpret the above-quoted statement to mean that, given the unique circumstances of the PacTel spin-off, favorable action on this waiver request would not affect the general issue of cellular eligibility to bid on and hold broadband PCS licenses. We agree, although we note that no Commission decision

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[5] In reply comments, US West argues that the waiver request is premature because the Commission has not yet established procedures and certification rules for applying for auctionable licenses. US West Reply at p. 2. It believes that the appropriate course would be for PTG and PacTel to apply for any needed waivers of the auction rules once they are effective. (In a later-filed clarification, US West nevertheless stated that it has no objection to PTG obtaining the substantive relief that it seeks.) Though it is true that the Commission has not yet adopted auction rules, PTG and PacTel are seeking a limited waiver of Section 99.204, a PCS rule that is currently in effect. We believe that it is proper for us to consider this request in light of the ramifications to PTG and to the market for PacTel stock if we refuse to do so.

[6] McCaw and GTE essentially reiterate positions they have taken concerning cellular bidding eligibility in filings in the broadband PCS reconsideration proceeding and in comments on the Auction NPRM. As noted above, the appropriate fora for the resolution of that issue is in those proceedings, not the instant adjudication.

in any adjudication proceeding is devoid of precedential value. However, the unique circumstances present here limit the precedential value of the instant decision.

9. Accordingly, IT IS ORDERED, pursuant to Sections 1.3 and 99.204 of the Commission's Rules, that the request for a waiver of Section 99.204 of the Commission's Rules, filed by Pacific Telesis Group and PacTel Corporation, IS GRANTED until the earlier of June 9, 1994, or the date of completion of the spin-off of PacTel from PTG. The effect of this waiver is to permit PTG or the Bells, prior to the spin-off of PacTel, to submit applications for broadband PCS licenses greater than 10 MHz in areas in which PacTel presently operates cellular systems without violating Section 99.204 of the Commission's Rules, but not to participate in any auction with respect to these applications unless the spin-off has been accomplished and any appropriate amendments or notifications have been filed.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1037

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	**PP Docket No. 93-253**
of the Communications Act -	)	
Competitive Bidding	)	

ERRATUM TO THIRD MEMORANDUM OPINION AND ORDER

Released: September 21, 1994

This Erratum makes minor corrections to the text of the final rules adopted in the Third Memorandum Opinion and Order in the above-captioned proceeding, FCC 94-219, which was released on August 17, 1994. The full text of the Third Memorandum Opinion and Order and the rules will be published as corrected in the FCC Record.

1. Section 24.309(f) is revised to add the following subsections:

(3) Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this penalty will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; in year three of the licenses term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty.

(4) Any business owned by minorities and/or women that obtains a narrowband PCS license through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and or women, this paragraph shall not apply; Provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

2. In order to make the text and the rules of the Third Memorandum Opinion and Order consistent, the text of the first line of paragraph 46 on page 22 is revised as follows:

For purposes of narrowband PCS, we shall therefore define a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years not in excess of $40 million.

FEDERAL COMMUNICATIONS COMMISSION

Robert M. Pepper
Chief, Office of Plans and Policy

FCC 94-219

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	
Narrowband PCS	)	
and		
Amendment of the Commission's	)	
Rules to Establish New Narrowband	)	GEN Docket No. 90-314
Personal Communication Services	)	ET Docket No. 92-100

THIRD MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 16, 1994 Released: August 17, 1994

Comment Date: September 16, 1994
Reply Comment Date: October 3, 1994

By the Commission:

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I. INTRODUCTION

1. By this action, we respond to petitions for reconsideration of the Third Report and Order in this proceeding.[1] The Third Report and Order established service-specific rules for competitive bidding for the award of licenses for Personal Communications Services in the 900 MHz band (narrowband PCS). Seven such petitions were received, as well as three oppositions and comments and one reply.[2]

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-173 (the Communications Act). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses. The Commission's Second Report and Order established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.[3]

3. The Third Report and Order established competitive bidding rules for narrowband PCS. The Commission decided that because of the interdependence within certain classes of narrowband PCS licenses and the relatively high expected value of such licenses, where the agency received mutually exclusive applications most narrowband PCS licenses would be awarded through a sequence of simultaneous multiple round auctions. However, we stated that we might alternatively use oral sequential or single round sealed bidding to award certain narrowband PCS licenses if the operational complexity or administrative costs associated with simultaneous auctions proved excessive relative to the expected value of the licenses to be awarded. We stated that in conducting narrowband PCS auctions we would generally follow the payment and procedural rules adopted in the Second Report and Order, and we adopted general procedural and processing rules for the narrowband PCS service based on Parts 22 and 90 of the Commission's rules. We also structured our rules to provide opportunities for

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[1] See Third Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) (Third Report and Order).

[2] Petitions for reconsideration were received from the Association of Independent Designated Entities (AIDE), Mercury Communications, Inc. (Mercury), Paging Network, Inc. (PageNet), Phase One Communications, Inc. (Phase One), the Rural Cellular Association (RCA), Tri-State Radio Co. (Tri-State), and U.S. Intelco Networks, Inc. (USIN). Oppositions or comments were received from United States Telephone Association (USTA), AirTouch Paging (AirTouch), and Paging Network, Inc. (PageNet); a reply was received from American Paging, Inc. (API).

[3] Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (Second Report and Order).

small businesses and businesses owned by women and minorities to participate in the auction and in the provision of spectrum based services.

4. On July 29, 1994 we completed the first spectrum auction for the ten available nationwide narrowband PCS licenses. This auction was the first test of the simultaneous multiple round auction design and of our provisions for designated entities. This auction was enormously successful. One indication of the efficiency of the simultaneous multiple round bidding process is the fact that the winning bids were either identical or virtually identical for virtually identical licenses. As we expected, this auction also attracted broad participation by designated entities. Of the 29 registered bidders 9, or 30 percent, indicated status as either minority or woman-owned firms. The strong bidding competition among relatively large firms and incumbent paging companies, however, may have been a factor in the lack of designated entities among the winning bidders. These results have caused us to reexamine some of the auction rules and designated entity provisions previously adopted in the Third Report and Order. In addition, we request comment on a number of possible further changes in the designated entity provisions that might apply to the upcoming MTA and BTA auctions.

II. AUCTION DESIGN

A. Bidding Procedures

5. In the Third Report and Order, the Commission noted its earlier findings 1) that licenses with strong value interdependencies should be auctioned simultaneously, 2) that multiple round auctions will generally yield more efficient allocations of licenses and higher revenues than other auction methodologies because they provide bidders with information regarding other bidders' valuations of licenses, and 3) that simultaneous multiple round auctions become less cost effective as the value of licenses decreases, because they are relatively time-consuming and expensive to implement.[4] The Commission stated that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals.[5] We stated, however, that we might use methods other than simultaneous multiple round bidding in cases where license values are expected to be relatively low, where bidder participation is expected to be limited, or where the interdependence of licenses is less significant.[6] We stated that in selecting the auction method for each narrowband PCS auction, we would

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[4] Third Report and Order at ¶ 12.

[5] Id. at ¶ 13.

[6] Id. at ¶ 20.

balance the advantages of more sophisticated auction methods, such as simultaneous multiple round bidding, with the greater complexity and cost they might entail.[7]

6. In the Third Report and Order the Commission decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because the value of those licenses is low relative to the cost of conducting more complex auctions. We also stated that because only incumbent paging licensees already serving the license area are eligible to bid on these licenses, sealed bid auctions might help to reduce the likelihood of collusion. We further stated that information about license values from earlier narrowband auctions would also be available to assist bidders in valuing these licenses. Moreover, because under the sealed bid approach bidders cannot be certain that they will be the high bidder on the licenses they seek to obtain, we allowed bidders to bid without risking a default penalty on more than the two licenses in each service area, provided they specify in advance the order in which they wish to be awarded such licenses if they are the high bidder on more than they are permitted to hold.[8]

7. Petitions. Paging Network, Inc. (PageNet) and Tri-State Radio Co. (Tri-State) seek reconsideration of the decision to use single round sealed bid auction procedures for assignment of the 12.5 kHz unpaired licenses.[9] PageNet and Tri-State assert that the Commission has underestimated the likely value of the response channel licenses.[10] PageNet and Tri-State also assert that great value interdependence exists among the response channel licenses.[11] They state that there are likely to be numerous bidders for most licenses.[12] In this regard, PageNet claims that collusive behavior is no more likely for these licenses than for other narrowband PCS licenses. PageNet and Tri-State question whether bidders for response channel licenses will obtain useful information about license values from previous narrowband PCS auctions. PageNet asserts that license values will vary from one provider and area to another, and that bidders may have no realistic idea as to the value of the licenses.[13] PageNet claims that the single sealed bid mechanism will require exorbitantly expensive

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[7] Id.

[8] Id. at ¶ 29.

[9] PageNet Petition at 2; Tri-State Petition at 3.

[10] PageNet Petition at 2; Tri-State Petition at 7.

[11] PageNet Petition at 5; Tri-State Petition at 3.

[12] PageNet Petition at 10; Tri-State Petition at 8.

[13] PageNet Petition at 5.

market research on the part of bidders, and the result will still depend on chance.[14] Further, PageNet states that it is important to choose an auction method which provides useful information on license values to bidders during the auction. Therefore, PageNet supports adopting an alternative auction method that is streamlined to minimize cost and complexity, and recommends an ascending bid multiple round methodology.[15]

8. Tri-State claims that the rules mandating single round sealed bidding are deficient from an auction design perspective. Tri-State asserts that these rules are poorly structured to allow bidders to obtain a common frequency across regions, and that under the rules bidders cannot know how to prioritize their bids. Tri-State further claims that the sealed bidding procedures require exceedingly complicated bidding strategies, which necessitate the adoption of a clear reallocation mechanism for defaulted licenses. Alternatively, Tri-State recommends a procedure in which bidders submit sealed bids for a given MTA or BTA without specifying which of the available frequencies the bidder is bidding on. Under Tri-State's recommended approach, winning bidders would be ranked for purposes of frequency selection according to the total amount they bid for all the channels on which they hold winning bids. Tri-State claims that this procedure maximizes the number of multiple MTA/BTA bidders who can obtain a common paging response channel in all markets in which they bid.[16] Tri-State argues that its proposed auction procedures will level the playing field between bidders for paging response channels and those for regional and nationwide narrowband PCS authorizations, who do not need to aggregate a common frequency across geographic areas.[17] Tri-State includes a 25 percent bidding credit for minority- and female-owned businesses and small businesses, and states that its plan could be refined by providing that winning bidders pay the highest losing bid for a license.[18] Tri-State asserts that its proposed auction procedures will ensure that the Commission maximizes revenues from paging response license auctions and allow bidders to set priorities more accurately and to adopt relatively simple bidding strategies.[19] AirTouch recommends multiple round simultaneous auctions, and suggests that bids for the response channels be in pool form, such that the highest four bidders would receive a license

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[14] Opposition of PageNet at 3.

[15] PageNet reserves comment on more specific procedures pending conclusion of the nationwide narrowband PCS and Interactive Video and Data Service (IVDS) auctions. Id. at 6.

[16] Tri-State Petition at 12-16.

[17] Id. at 17.

[18] Id. at 18-20.

[19] Id. at 21.

and could agree among themselves as to the licenses to be held by each.[20] American Paging, Inc. (API) supports multiple-round ascending simultaneous bidding methodologies, at least for the MTA response channel licensing.[21]

9. Discussion. Petitioners have convinced us that paging response channel licenses may have more value interdependency, and higher value, than was apparent at the time of the Third Report and Order. We also recognize that alternative auction methodologies proposed by petitioners may offer a low-cost auction method with desirable characteristics for auctioning interdependent licenses, and thus may prove superior to the sealed bid approach set forth in the Third Report and Order. In addition, the recent nationwide narrowband auction demonstrated that simultaneous multiple round auctions are easier and less expensive to implement than we earlier anticipated, and thus they may prove to be an appropriate procedure for auctioning the response channel licenses. However, we will defer our decision regarding the auction design for the 12.5 kHz MTA and BTA paging response channels until we have gained further experience with simultaneous multiple round auctions. We will announce our final choice of auction design and procedures for the response channels by Public Notice prior to the auction.

B. Minimum Opening Bid

10. In the Third Report and Order, we stated that we believe it is necessary to impose a minimum bid increment to ensure that the auctions conclude within a reasonable period of time in narrowband PCS auctions where simultaneous multiple round bidding is used. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We stated that we might impose a minimum bid increment of 5 percent or $0.01 per MHz per pop, whichever is greater, in narrowband PCS auctions where multiple round bidding is used. We also retained the discretion to vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.[22]

11. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid or a minimum opening bid on each license in addition to the minimum bid increment.[23] If we were to adopt minimum opening bids, we anticipate that we would seek expedited comments on any figures proposed. Once a minimum bid is established for a license, initial bids will have to be above that level to be considered valid.

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[20] Opposition of AirTouch at 7-8.

[21] Reply of API at 2.

[22] Third Report and Order at ¶¶ 30-32.

[23] See ex parte submission of Paul Milgrom, May 19, 1994 and Fifth Report and Order ¶45.

The amount of the suggested opening bid or the minimum opening bid, if one is used, will be set forth in the Public Notice announcing the auction. Generally, we will establish suggested opening bids or minimum opening bids in the range of $.03 - $.20 per MHz-pop for each license.[24] A suggested opening bid or minimum opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion to the auction.

C. Activity and Stopping Rules

12. In the Third Report and Order, we stated that when we use the three-stage Milgrom-Wilson activity rule, the auction will move from stage I to stage II when, after three rounds of bidding, the high bid has changed on 5 percent or fewer of the licenses (measured in MHz-pops) being auctioned. Stage III will begin when the high bid has changed on 2 percent or fewer licenses over three rounds.[25] We conclude after our experience in conducting the nationwide narrowband auction that we may find it important to move the auctions from one stage to the next at a different pace than would occur under this rule. Accordingly, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, (e.g., the percentage of licenses on which there are new bids, the number of new bids, and the percentage increase in revenue). Bidders will be notified at least one round prior to the commencement of the next stage of an auction.

13. We also stated that in stage III, a bidder would have to be active on 100 percent of the MHz-pops for which it wishes to retain eligibility.[26] In order to allow bidders greater flexibility, we think that it may be beneficial in some auctions to reduce this figure slightly, but in no case below 90 percent. We will announce the required activity levels for stage III in a Public Notice in advance of each auction.

14. In the Third Report and Order, we stated that where we use the Milgrom-Wilson activity rule we intend to use a simplified waiver procedure whereby bidders will be permitted

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[24] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. In its September 1993 Mid-Session Review of the 1994 Budget, the Office of Management and Budget estimated that spectrum auctions would generate $12.6 billion from 1994 through 1998. A 1992 report by the Congressional Budget Office assumed that $2 billion would be raised from competitive bidding in services other than PCS. Thus, the approximate value of 120 MHz of PCS spectrum is placed at $10.6 billion according to these estimates, or 35 cents per pop per MHz.

[25] Third Report and Order at n. 16.

[26] See Third Report and Order ¶¶38.

five automatic waivers from the activity rule during the course of an auction.[27] A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. Subsequently, we have concluded based on our experience in conducting the nationwide narrowband auction that fewer waivers may be necessary to maintain the pace of the auction and prevent strategic use of waivers. Consequently, we will allow one automatic waiver from the activity rule during each stage of an auction, or one automatic waiver during a number of bidding rounds specified in a Public Notice. We retain the flexibility, however, to change by Public Notice the number of waivers that will be permitted and the frequency with which they may be exercised by public notice prior to a specific narrowband auction. While we may allow bidders to request proactive waivers that will keep the bidding open, under no circumstances will an automatic waiver prevent an auction from closing.

15. In the Second Report and Order, we retained the discretion to declare by announcement at any point during a multiple round auction that the auction will end after a specified number of additional rounds.[28] We want to clarify however, that if this procedure is used, we will accept bids in the final rounds only for licenses on which the highest bid increased in at least one of the preceding three rounds. No new bids will be accepted for other licenses.[29] There are two reasons not to take bids on licenses on which there has been no recent bidding. First, the fact that bidding on an individual license may close will provide an additional incentive to bid actively and thus speed the conclusion of the auction. If bids are accepted on all licenses in the final rounds there is less cost to a bidder in holding back. Second, closing bidding on licenses for which activity has ceased ensures high bidders for those licenses that they will not lose a license without having an opportunity to make a counter-offer.[30] This reduces the uncertainty associated with aggregating licenses that are worth more to a particular bidder as a package than individually. If final bids are accepted on all licenses, a high bidder on an aggregation of licenses may unexpectedly lose a critical part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

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[27] Third Report and Order at ¶ 40.

[28] Second Report and Order at ¶ 132.

[29] See reply comments of PacBell, appendix to attachment by Milgrom and Wilson at 5. See also Second Report and Order at ¶ 130, n.106.

[30] Either the auction will close only when bidding ceases on all licenses, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on licenses on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

D. Release of Bidder Information

16. We note that in the reconsideration of the Second Report and Order we reserved additional flexibility with respect to the requirement to release information concerning the identity of bidders, which may affect auctions for narrowband PCS licenses. In the Second Memorandum Opinion and Order we reserved the option to release bidder identities on an auction-by-auction basis, and stated that we would announce by Order and Public Notice prior to each auction whether the identities of bidders would be made public in that auction.[31] In this regard, we retain the flexibility in the context of narrowband PCS auctions to determine on an auction-by-auction basis whether or not to release bidder identities during the course of the auction.

E. Filing Procedures

17. Petition. Phase One asserts that the Communications Act permits the FCC to employ competitive bidding procedures only where mutual exclusivity exists, and that consequently the FCC is prohibited from establishing specific auction dates until it has determined that a particular application is mutually exclusive with another.[32] Phase One states that the FCC must first notify each qualified applicant of its application processing status in advance of scheduling auctions to allow applicants sufficient time to analyze auction strategies and evaluate the competition.[33] Phase One also states that the FCC is obligated to suspend its auctions until each petition in PP Docket No. 93-253 has been addressed.[34] Phase One states that our contractor, Tradewinds International, Inc. (Tradewinds) must be prevented from promoting FCC auctions. Because there can be no auctions without mutual exclusivity, according to Phase One the advertising by Tradewinds amounts to false and misleading advertising and raises conflict of interest questions because Tradewinds may benefit if auctions are actually held.[35]

18. AirTouch Paging (AirTouch) asserts in opposition that the Communications Act only prohibits auctioning of a license for which no mutually exclusive applications have been accepted for filing, and not the establishment of auction dates. In fact, AirTouch notes that mutually exclusive applications were received for each of the nationwide narrowband PCS

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[31] Second Memorandum Opinion and Order at ¶ 46.

[32] Phase One Petition at 2.

[33] Id. at 3.

[34] Id. at 5.

[35] Id. at 5-6.

licenses.[36] PacBell states that there is no legal basis for Phase One's argument that the Commission must delay announcing auction dates until mutual exclusivity has been established.[37]

19. Discussion. The Budget Act provides that if applications are not mutually exclusive no auction will be held.[38] We have found, however, that it is important to begin planning for auctions as early as possible to assure that they will run smoothly. To maintain an expeditious auctioning and licensing schedule it is necessary, for instance, to reserve sites for auctions before all applications have been received. Further, we believe that it is important that we schedule auctions far enough in advance to provide applicants with ample time to attract financing and plan their bidding strategies. In any event, we have previously indicated that we will cancel a scheduled auction if we do not receive mutually exclusive applications.[39] Consequently we believe that our auction schedule and procedures are fully consistent with the provisions of the Budget Act.

20. We find advertising of auctions desirable and in the public interest, even if, because of lack of mutual exclusivity, no auction takes place for some licenses. Among its other beneficial effects, advertising of auctions may be essential for making potential licensees, and in particular designated entities, aware of the opportunities available to them. In order to make service available as rapidly and efficiently as possible, we must ensure that those who value the license most highly, and will offer the services most valued by the public, have an opportunity to bid on them. Mutual exclusivity cannot be established until applications have been received, and at that point advertising will no longer be useful because the purpose of advertising is to inform potential licensees of the opportunity to file applications. Consequently, we retain our existing filing procedures and continue to permit our contractor to advertise auctions even before mutual exclusivity has been established.[40]

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[36] Opposition of Airtouch at 4.

[37] Opposition of PacBell at 8.

[38] 47 U.S.C. § 309(j)(1).

[39] See Second Report and Order at ¶ 165. In fact, 29 applicants are eligible to bid for nationwide narrowband PCS licenses; at least 24 applicants are eligible to bid on each of the ten licenses. Thus, mutual exclusivity exists for all nationwide narrowband licenses, and Phase One's petition is moot on this point.

[40] In this regard we also note that since we find that advertising auctions is in the public interest, no conflict of interest exists between Tradewinds' interests and the Commission's.

F. Application-Processing Rules

21. In the NPRM in this proceeding, the Commission stated:

> In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications.[41]

22. Petition. AIDE asserts in its petition for reconsideration of the Second Report and Order that the Commission acted improperly in proposing substantive PCS application-processing rules in the NPRM because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of §309(j) of the Communications Act.[42] AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the Second Report and Order the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the NPRM. AIDE concludes that the Commission needs to issue a supplemental Notice of Proposed Rulemaking to adopt license-processing rules for PCS. PacBell states, however, that the Administrative Procedure Act does not prohibit the Commission from issuing more than one order based on a notice and comment period.[43] PacBell also states that there is an exception to the Administrative Procedure Act's notice and comment requirements "when the agency for good cause finds (and incorporates the finding. . .in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[44]

23. Discussion. The Commission adopted few filing or processing rules in the Second Report and Order. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.[45] In the Second Memorandum Opinion and Order we stated that we would address AIDE's concerns in the reconsiderations of the service-specific Orders in which the application processing rules were adopted. In the Third Report and Order, we adopted the service-specific narrowband

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[41] NPRM at ¶128.

[42] AIDE Petition at 20-21.

[43] PacBell Opposition at 10.

[44] Id. at 11, citing 5 U.S.C. § 553(c).

[45] See Second Report and Order at ¶¶ 164-168, NPRM at ¶¶ 96-101.

PCS application processing rules to which AIDE's petition refers and thus, we address the substance of AIDE's arguments below.

24. The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. By citing in the NPRM the specific Part 22 and Part 90 application processing rules that we would use as the basis for adopting PCS rules, we provided commenters with exceptionally clear notice and an opportunity to comment on the rules we contemplated adopting for narrowband PCS. The few changes that we made from the proposed rules were necessary to adapt them to auctioning narrowband PCS licenses. For example, we adopted certain technical requirements such as restrictions on station antenna structures.[46] We also deleted any procedures that were related to grants by random selection.[47] The resulting rules are clearly a logical outgrowth of the rules proposed in the NPRM, applied in the context of the use of competitive bidding to assign narrowband PCS licenses. Rules adopted as a logical outgrowth comply with all Administrative Procedure Act requirements.[48]

III. RULES PROHIBITING SETTLEMENTS AND COLLUSION

25. Petitions and Oppositions. The collusion rules adopted in the Third Report and Order prevent bidders for narrowband PCS licenses from entering into settlement agreements after applications are filed. AIDE asserts that narrowband bidders should be allowed to enter into settlement agreements, as encouraged by Section 24.429(b), and asserts that the Commission's decision to avoid post-filing settlements was impermissibly based on consideration of potential revenues. Quentin L. Breen (Breen) urges us to act on AIDE's petition to liberalize treatment of full market settlements. Breen states that the Budget Act does not relieve the Commission of its obligation in the public interest to continue to use means such as negotiation to avoid mutual exclusivity, nor does the Act oblige us to adopt anti-collusion regulations. Instead of permitting applicants to avoid the uncertainties and inefficiencies of the auction process, Breen states that the rules effectively mandate that parties will go to end of auction without being able to consider settlement.[49] PageNet, conversely, urges the Commission to prohibit any settlement negotiations during the competitive bidding process.[50] According to PageNet, there is no way for mutually exclusive

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[46] 47 C.F.R. § 24.416.

[47] 47 C.F.R. § 22.33.

[48] Public Service Commission of the District of Columbia v. FCC, 906 F.2nd 713, 717 (D.C. Cir. 1990).

[49] Breen Opposition at 1-4.

[50] PageNet Opposition at 20-26.

applicants to come to an agreement on settlement without exchanging the same kinds of information that would be exchanged for the formation of collusive strategies in auction bidding. Accordingly, PageNet asserts that settlement discussions should be prohibited prior to selection of a winner from among the Form 175 applicants[51] Furthermore, PageNet contends, that there is little likelihood of an all-market settlement in any given market, because if any one applicant declines to settle, the settlement is defeated.[52]

26. Discussion. As stated in our reconsideration of the Second Report and Order, we have decided to retain the existing collusion rules, to the extent that they prevent settlements after applications are filed.[53] These rules were designed to avoid formation of anticompetitive agreements among bidders, although we intend to continue reliance on the antitrust laws as our primary method of avoiding bidder collusion.[54] As we indicated in the Second Report and Order, we believe that our rules prohibiting collusion will serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.[55] We also seek to ensure that entities will not file applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal of their applications.

27. Accordingly, to ensure that the bidding process is competitive and to encourage formation of a competitive post-auction market structure, we are retaining the collusion rules in the narrowband PCS context.[56] Furthermore, to make clear that we recognize that these rules effectively prohibit post-filing settlements, we are amending our rules to eliminate Section 24.429(b). We believe that this is the most straightforward approach, given our strong concerns that collusion could have an extremely harmful impact upon competition.

28. However, in order to provide bidders sufficient time and greater flexibility to attract capital, we make several modifications to our collusion rules adopted in the Third Report and Order. First, in the Second Memorandum Opinion and Order, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership

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[51] Id. at 22 & n.11.

[52] Id. at 24.

[53] See Second Memorandum Opinion and Order at ¶ 54.

[54] See Second Report and Order, ¶¶ 221-224.

[55] Id.

[56] See id., ¶ 223.

interest with another applicant.[57] In that item we stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. This prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.

29. Furthermore, where common non-controlling ownership exists between two or more bidders, those bidders may win more licenses cumulatively than a single entity is entitled to hold. In such cases we will permit divestiture of non-controlling interests to bring the entities into compliance with the license aggregation limits provided such divestiture is completed within 90 days of grant of the license. Such post-auction divestiture will enable investors to finance more than one bidder without risking default penalties if both bidders win licenses which in combination exceed our aggregation limits.

30. In addition, we wish to modify our rules regarding amendments to short-form applications. Section 24.413 of the Commission's rules requires all applicants to list certain ownership information including all partners, subsidiaries, affiliates and all persons holding five percent or more of the stock, warrants, options or debt securities of the applicant. Section 24.422 (b) currently prohibits amendments to the short-form application to make ownership changes or changes in the parties to bidding consortia after the application filing deadline has passed. As a result of our experience in the nationwide narrowband PCS auction we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant and provided that discussions leading up to such changes do not violate our anti-collusion rules. Such amendments must be made within two business days of any such change. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify rule 24.422 (b) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant.

31. In addition, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortia arrangements or joint bidding agreements of any kind after the deadline for short form applications has passed. In order to permit bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of

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[57] Second Memorandum Opinion and Order at ¶ 55.

an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct with respect to a single license and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

IV. PAGING RESPONSE CHANNEL ELIGIBILITY

32. Mercury submitted a request for clarification that non-incumbent paging licensees will be permitted to apply for only those narrowband paging response channel licenses that remain available after the initial response channel auctions. Eligibility requirements for these channels were adopted in GEN Docket No. 90-314, and therefore we will address this issue as part of the further reconsideration of the narrowband PCS service rules in that docket and in ET Docket No. 92-100.

V. DESIGNATED ENTITY PROVISIONS

33. Background. In the 1993 Omnibus Budget Reconciliation Act, Congress amended the Communications Act to require the Commission to ensure that small businesses, rural telephone companies, and businesses owned by women and minority group members (designated entities) would have an opportunity to obtain licenses and participate in offering spectrum-based services.[58] We considered numerous alternatives that might ensure opportunities for these designated entities, including installment payment plans, bidding credits, spectrum set-asides, tax certificates, royalty payments, innovator's preferences, and distress sales to designated entities.[59] After considering the characteristics of the narrowband PCS service, we ultimately adopted installment payments for small businesses acquiring certain regional, MTA or BTA licenses.[60] We also provided that a 25 percent bidding credit would be available to businesses owned by minorities and/or women on certain nationwide, regional, MTA and BTA licenses.[61] Both installment payments and bidding credits were made available to small businesses owned by minorities and/or women. In addition, we provided that tax certificates would be made available to encourage investment in women- and

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[58] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-389 (1993) (Budget Act) (adopting 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D)).

[59] See Second Report and Order, ¶¶ 231-257, See Infra ¶¶64-68 for discussion on why provisions are necessary.

[60] See Third Report and Order, ¶¶ 68, 86-89.

[61] Id., ¶ 72.

minority-owned businesses.[62] Our rules, however, did not permit rural telephone companies to obtain bidding credits or installment payments unless they also qualified as small businesses or businesses owned by minorities and/or women.[63]

34. Petitions. Three petitioners assert that provisions made available for various designated entities, such as bidding credits, installment payments and tax certificates, should also be made available to all designated entity groups, and for all narrowband PCS licenses. The Association of Independent Designated Entities (AIDE) suggests that bidding credits, currently available for all businesses owned by minorities and/or women, should be granted to all small businesses and rural telephone companies, for all narrowband PCS licenses.[64] AIDE reasons that even if bidding credits are not appropriate for small businesses applying for nationwide licenses (because small businesses can not afford to construct nationwide narrowband PCS systems), the Commission should nevertheless permit small businesses to obtain bidding credits for the smaller, geographically limited narrowband licenses.[65] AIDE also states that the decision to limit installment payments to certain licenses was impermissibly based on maximizing auction revenues.[66]

35. U.S. Intelco Networks, Inc. (USIN) and the Rural Cellular Association (RCA) assert that the failure to provide any narrowband provisions for rural telephone companies violates the Budget Act[67] and ensures that narrowband PCS will be unavailable in rural

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[62] Id., ¶¶ 68, 70, 72-85.

[63] As discussed further infra, these rules were based on the rationale that rural telephone companies do not face special barriers to entry into this service, nor are special accommodations necessary to ensure service in rural areas. See Third Report and Order, ¶¶ 71, 76. We concluded in the Third Report and Order that, given the relatively modest construction costs for narrowband PCS, even new entrants may choose to provide service to rural areas, and special provisions are not necessary to ensure that rural telephone companies will have the opportunity to participate in provision of service to rural areas. Id., ¶ 71. We noted that women, minorities, and small businesses, in contrast, may face particular financing obstacles that require additional provisions to ensure that they have an opportunity to participate in providing narrowband PCS. Id., ¶¶ 72, 76.

[64] AIDE Petition at 14-18.

[65] AIDE Petition at 16-17.

[66] Id. at 18-19.

[67] The Budget Act names rural telephone companies as one of the groups whose opportunity to participate in auctioned services must be ensured by our auction procedures. See Budget Act, § 6002, 107 Stat. 388 (adopting 47 U.S.C. § 309(j)(3)(B) and 309(j)(4)(D)).

areas.[68] RCA states that rural telephone companies should receive bidding credits and tax certificates.[69] RCA bases this assertion on the rationale that providing special bidding provisions for rural telephone companies would increase the likelihood that narrowband PCS licenses will be awarded to entities that will provide service to rural areas.[70] RCA also notes that the Budget Act directs that the auction procedures must ensure that licenses for new technologies are awarded in a manner that promotes their rapid deployment "for the benefit of the public, including those residing in rural areas."[71]

36. Oppositions. PageNet states that no additional measures should be taken with respect to participation of rural telephone companies or small businesses in narrowband PCS auctions.[72] As to the availability of provisions for women and minority-owned businesses for only one license per channel grouping, PageNet notes that licenses with bidding credits comprise 37 percent of regional licenses and almost 45 percent of the available narrowband spectrum, thus earmarking a good deal of spectrum for designated entities.[73] PageNet states that small businesses have always had ample opportunities in paging, and thus there is no reason to grant them special consideration.[74] We also request comment on a proposal to redesignate the BTA licenses as regional licenses.

37. Decision. We have decided, in response to petitions and to our experience with the nationwide narrowband auction, to expand the provisions for designated entities in future narrowband auctions. First, we will modify the definition of small business to expand eligibility. Second, for the upcoming regional narrowband auctions we will increase the bidding credit for women- and minority-owned businesses. Finally, as described in Section VI below, we propose, and request comment on, additional designated entity provisions for the MTA and BTA auctions.[75]

38. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are

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[68] See USIN Petition at 1-8, RCA Petition at 2-9.

[69] RCA Petition at 9.

[70] RCA Petition at 2

[71] Id. (quoting 47 U.S.C. § 309(j)(3)(A)).

[72] PageNet Opposition at 12-15.

[73] Id. at 14.

[74] Id. at 14-15.

[75] See ¶¶64 infra.

given the opportunity to participate in the provision of spectrum-based services."[76] To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we may charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in narrowband PCS.

39. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[77] Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

40. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules to govern the special measures for small businesses, and businesses owned by members of minority groups and women. In the Third Report and Order, we employed several measures, including installment payments, bidding credits and tax certificates, to enhance opportunities for designated entities bidding on certain narrowband PCS licenses. We stated that we believed that narrowband PCS would provide significant opportunities for all designated entities to provide a wide variety of new services including advanced paging and messaging services. In adopting the particular measures for designated entities, however, we assumed that narrowband PCS would involve relatively low

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[76] 47 U.S.C. § 309(j)(4)(D).

[77] 47 U.S.C. § 309(j)(3)(B); see also id. § 309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women). As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n.3.

capital entry requirements, and would therefore be well-suited to small entities, which lack access to large amounts of capital.[78] Accordingly, we found that the measures we selected for narrowband PCS auctions were appropriately tailored to the unique characteristics of narrowband PCS and would therefore "create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public."[79] In this regard we indicated that installment payments would provide a significant means for small businesses to overcome their main barrier to entry: lack of access to financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program would address the additional obstacles faced by those designated entities. We noted, however, that we would continue to assess the effectiveness of the measures adopted for narrowband PCS, and would apply any knowledge gained to subsequent auctions.

41. Our goal in the narrowband personal communications service is to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully below, we believe that it is necessary in some respects to do more to ensure that small businesses and businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of narrowband PCS. As a result of our experience in the nationwide narrowband PCS auction, we are concerned that a 25 percent bidding credit and installment payments may not be sufficient to ensure the opportunity of these businesses to compete against the larger, deep pocketed incumbent firms. Therefore, we have decided to expand the provisions for designated entities as described below.

A. Definition of Small Business

42. In the Third Report and Order we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. 13 C.F.R. § 121.802(a)(2).[80] In the Second Memorandum

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[78] Third Report and Order at ¶ 69.

[79] Id. at ¶ 70.

[80] The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. See 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to $18 million net worth and $6 million after-tax net income. 13 C.F.R. § 121.802(a)(3)(i). The

Opinion and Order, we removed our generic "small business" definition, which was based on the original SBA size standard and indicated that we would establish a definition for "small businesses" on a service-specific basis.

43. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in gross revenues. Similarly, Suite 12 suggests a $75 million in annual sales threshold. As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[81]

44. We now realize that the cost of acquiring a narrowband PCS license will be significant and bidders may be required to expend millions of dollars to acquire a license and construct a system in PCS markets. Thus, we believe that our current narrowband PCS small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of narrowband PCS services. Accordingly, we modify our small business definition for narrowband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of narrowband PCS services.

45. There is substantial support in the record for a $40 million gross revenue standard. For example, the SBA recommends that for PCS, a small business be defined as

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change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955.

[81] Some parties recommend using the SBA's alternative 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. See, e.g., comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

one whose average annual gross revenues for its past three years do not exceed $40 million.[82] It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with $40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.[83] Similarly, the SBA Chief Counsel for Advocacy asserts that a $40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."[84]

46. For purposes of narrowband PCS, we shall therefore define a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than $40 million.[85] In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has $40 million or more in personal net worth.[86] To ensure that only bona fide small businesses in need of government financing are eligible, we will consider the gross revenues of the applicant, its affiliates, as well as those of "attributable" investors on a cumulative basis. The text that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants.

47. Qualified "Small Businesses". As a general rule, the gross revenues of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for

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[82] Ex parte filing of U.S. Small Business Administration, June 24, 1994.

[83] Id.

[84] Comments of SBA Office of Advocacy at 10. Cf. comments of Iowa Network and Telephone Electronics Corporation (advocating a $40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating $40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

[85] The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642 (a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average annual gross revenues of such business over a period of not less than three years. See Pub. L. No. 102-366, Title II, § 222 (a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a) (2) (B) (ii).

[86] Unlike our proposed eligibility criteria to bid in the entrepreneurs' blocks, described below, the small business definition does not include a total assets standard. We believe that the $40 million gross revenue cap for small businesses should be sufficient to ensure that only bona fide small businesses are able to take advantage of the measures intended for them.

purposes of determining whether the $40 million gross revenue threshold has been exceeded, and on an individual basis regarding the $40 million personal net worth standard.[87] There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on a aggregate basis, exceed the gross revenue cap. Second, the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or voting stock that includes no more than 15 percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be no more than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.[88] The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.[89] In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenues threshold and applicants shall certify that each control group member meets the individual $40 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

48. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue cap. At the same time, it will afford qualified bidders a reasonable measure of

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[87] By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

[88] Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

[89] So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders. Similarly, the 15 percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue influence over eligible firms. For all of these reasons, we also will attribute the gross revenues of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.[90]

49. Qualified Woman and Minority-Owned Small Businesses. The record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned small businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues or net worth of any single investor in a minority or woman-owned small business applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as 15 percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.[91] Winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenue threshold or the individual $40 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

50. Relaxing the attribution standard somewhat in determining the eligibility of women and minority-owned companies to bid as small businesses directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid as small businesses (i.e., who otherwise meet the $40 million gross revenue standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume de facto control of the applicant.

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[90] The definition of an "affiliate" is set forth in subsection 118, infra.

[91] As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

51. Of course, women and minority-owned firms, like any other small business applicant, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements for small businesses. Specifically, the gross revenues and net worth of all investors holding more than 25 percent of the company's passive equity (as defined to include 15 percent or more of the voting stock) will be attributed toward the $40 million cap and the $40 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

52. De Facto Control Issues. We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains de facto as well as de jure control of the firms that are eligible for special treatment under the rules for narrowband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business. These SBA rules, which are codified in 13 C.F.R. § 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure de facto control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the Second Report and Order, designated entities must be prepared to demonstrate that they are in control of the enterprise.[92]

53. In the Second Memorandum Opinion and Order, we concluded that designated entities might be permitted to receive benefits based on their participation in consortium on a service specific basis, but believed generally that such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the narrowband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong narrowband PCS competitors. Because of the exceptionally large capital requirements associated with acquiring a license in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as

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[92] Second Report and Order at ¶ 278, citing Intermountain Microwave, 24 Rad. Reg. 983, 984 (1963).

distinguished from a single entity with gross revenues in excess of $40 million, still are likely to encounter capital access problems and, thus, should qualify for measures aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses. This would have the effect of eviscerating our small business definition criteria and would not further the ability of bona fide small businesses to participate in PCS services.

54. Financial Benefits. To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements. As noted previously, we shall require that at least 50.1 percent of the voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

55. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise pro rata in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

56. Abuses. As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses are bona fide in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees that have received small business provisions or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in narrowband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

57. In addition, in view of our new small business definition and the associated maximum investor limits, we are modifying our unjust enrichment rules to prevent any post-auction circumvention of our financial threshold, and to ensure that the ultimate licensees are bona fide designated entities. Accordingly, firms that received installment payments based on their small business status will be subject to repayment if, for example, another entity subsequently purchases an "attributable" interest or becomes a member of the control group and, as a result, the gross revenues of the firm would exceed the $40 million gross revenues cap, or the personal net worth of an individual investor exceeds the $40 million personal net worth threshold.

B. Bidding Credits in Regional Narrowband Auctions

58. In the Third Report and Order we established bidding credits of 25 percent for women-and minority-owned businesses on two of the six regional narrowband licenses.[93] In order to increase the opportunities for women and minorities to participate in the provision of narrowband service, we have decided to increase the bidding credit on the same two licenses for women-and minority-owned businesses in the upcoming regional narrowband auction from 25 percent to 40 percent. Our experience with the nationwide narrowband PCS auctions, where very high license values coupled with only a 25 percent bidding credit may have contributed to the failure of women-and minority-owned businesses to win licenses, suggests that a credit of this magnitude may be necessary to overcome the disadvantages of these groups in bidding for licenses representing large populations and large geographic areas.[94] In an ex parte filing, Essence Television Productions, Inc. one of the initial participants in the nationwide narrowband PCS auction, argues that designated entities should receive bidding credits of up to 40 percent when competing in auctions against non-designated entities.[95] The increased bidding credit combined with installment payments for firms that meet our revised small business definition should enable minority-and women-owned businesses to attract the capital necessary to compete. In addition, we seek comment on whether additional measures such as an entrepreneurs' block should be employed in future auctions (see infra.).

C. Rural Telephone Companies

59. In this docket, we established general rules and identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we would choose among in establishing rules for auctionable spectrum-based services, on a service-specific basis. In adopting service-specific rules, we have carefully selected provisions to meet the particular needs of each designated entity group, so as to "ensure," pursuant to the

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[93] Third Report and Order at ¶ 68.

[94] We have already adopted installment payments for small businesses on regional, MTA and BTA licenses. See Section 24.309 (A).

[95] Ex parte filing of Essence Television Productions, Inc., August 2, 1994.

statute, that each group has the opportunity to participate in providing spectrum-based services.

60. As we indicated above, it is occasionally necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in provision of personal communications services than is necessary to ensure that other designated entity groups have similar opportunities.[96] The major problem facing minorities and women who seek to offer PCS is lack of access to capital.[97] Small businesses also encounter serious funding problems.[98] In contrast rural telephone companies that are not small businesses (and are not owned by minorities or women) do not face the same difficulties in obtaining capital. Accordingly, we do not believe that any additional provisions for rural telephone companies are necessary or appropriate in the context of narrowband PCS. Moreover, as we stated in the Second Report and Order, limiting installment payments to smaller businesses, including those owned by minorities and women, best comports with the intent of Congress by avoiding auction procedures that tend to favor incumbents with established revenue streams over new companies and entrepreneurs.[99] Therefore, rural telephone companies that are not eligible as small businesses will not receive installment payment assistance.

61. Finally, we believe that special provisions for rural telephone companies that are not smaller entities are not necessary in this context to encourage service to rural areas.[100] Especially in regions where the lack of wireline service makes wireless alternatives desirable, paging service is provided to rural areas by paging companies as well as telephone companies. We therefore believe that many telecommunications companies, and not only rural telephone

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[96] Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, adopted June 29, 1994, released July 15, 1994 (Fifth Report and Order) at ¶ 96.

[97] Id.; see also, e.g., Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 90-314 (Sept. 15, 1993), reprinted at 8 FCC Rcd 7820, 8727 (1993) (SBAC Report); Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112(4), 331(a)(4), Pub. Law 102-366, Sept. 4, 1992 (Small Business Credit Act) (finding that minority- and woman-owned businesses encounter particular problems in obtaining capital, and minorities face "extraordinary" obstacles in this regard);

[98] See Fifth Report and Order ¶¶ 93-108.

[99] See Second Report and Order, ¶¶ 234 & n.179 (citing H.R. Rep. No. 103-111 at 255), 237. We note, however, that many more rural telephone companies are considered small businesses under our revised small business definition than was the case previously.

[100] Congress did not instruct us to provide for every designated entity group in every service, and we believe that provisions for this particular group are not necessary for narrowband PCS.

companies, will pursue ordinary profit incentives to provide narrowband PCS service to outlying areas. Accordingly, we believe that installment payment plans are not necessary to encourage larger rural telephone companies to provide this relatively low-cost service in rural areas.

D. Other Designated Entity Decisions

62. We make two additional decisions concerning designated entities on our own motion. First, we clarify that, for a partnership to qualify for designated entity status, all general partners in the applicant and its "control group" must be eligible entities, consistent with our revised generic eligibility criteria in the Second Memorandum Opinion and Order in this proceeding. For the purposes of our rules, we presume that all general partners in a partnership have the power to bind the partnership, and therefore have de facto control.[101] Therefore, to ensure that designated entity provisions are made available only to legitimate eligible entities if the partnership is to receive designated entity benefits, all general partners will be required to be designated entities if the partnership is to obtain designated entity status.

63. In addition, we are adopting for narrowband PCS the requirement that all entities claiming a designated entity benefit must substantiate their eligibility for such benefits. In a related action reconsidering the Second Report and Order in this proceeding, we are requiring applicants that seek designated entity benefits to document their eligibility for such benefits.[102] For narrowband PCS we therefore require designated entity applicants to describe on their long-form applications how they meet the eligibility criteria for designated entity benefits. Applicants must list and summarize on their long-form application all agreements that affect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request. We believe that this provision will prove useful when the Commission conducts its random audits of designated entities providing narrowband PCS to ensure their continuing designated entity status.

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[101] See, e.g., Fifth Report and Order, ¶ 158 & n.134 (making such a presumption and therefore treating each general partner in a partnership applying for broadband PCS licenses as part of the partnership's control group).

[102] See Second Memorandum Opinion and Order at ¶ 134; Cook Inlet Petition for reconsideration of Second Report and Order at 16.

VI. PROPOSED DESIGNATED ENTITY PROVISIONS FOR MTA AND BTA AUCTIONS

A. Introduction

64. In the Budget Act, Congress recognized the novelty of auctions as a licensing method and encouraged us to experiment with a variety of techniques to ensure that small businesses and those owned by women and minorities have an opportunity to participate in spectrum-based services. While we believe that measures taken with respect to the regional narrowband PCS auctions will provide substantial opportunities for designated entities to participate in narrowband PCS, we seek comment on whether it may be necessary to adopt alternative provisions such as entrepreneurs' blocks or higher bidding credits to encourage investment in minority- and women-owned businesses in future auctions. As we have learned, narrowband PCS licenses may be auctioned for large sums of money in the competitive bidding process. It therefore may be necessary to do more to ensure that designated entities have the opportunity to participate in narrowband PCS than may be necessary in other, less costly spectrum-based services. In our view, we must consider whether these steps and any others we may adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. We believe that the measures we propose today would increase the likelihood that designated entities will win licenses in the auctions and become strong competitors in the provision of narrowband PCS service. We also will review the results of the regional auction in making our decision on the rules proposed in this Further Notice.

65. As we noted in the Fifth Report and Order, by instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital.[103] Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[104] Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[105]

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[103] Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, adopted June 29, 1994, released July 15, 1994 (Fifth Report and Order) at ¶ 97.

[104] Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

[105] Id., Section 331(b)(2),(3).

66. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."[106] A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. As we noted in the Fifth Report and Order, in October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.[107] The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, we found that it is reasonable to expect that race will affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan process, which uses more standard rules.

67. Similarly, evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college-educated, similarly situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to $1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only $1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.[108]

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[106] Id., Section 112(4); 331(a)(4).

[107] Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

[108] Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

68. We also stated in the Fifth Report and Order that inability to access capital is also a major impediment to the successful participation of women in PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.[109] AWRT documents that these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the $3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.[110]

69. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.[111]

70. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract effectively these barriers to entry. As chronicled in the Fifth Report and Order, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women.[112] These efforts however, have met

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[109] Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. See Pub. L. 102-191 (1991).

[110] See Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

[111] See The National Foundation for Women Business Owners, Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993.

[112] See Fifth Report and Order at ¶¶ 103-106.

with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the United States.[113] And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.[114] When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.[115] One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to narrowband PCS. They thus face an additional barrier relative to many existing service providers.

71. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.[116]

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[113] See Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

[114] See Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes sole proprietorships, partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

[115] Id.

[116] Ex parte filing of DCR Communications, May 31, 1994.

72. In the new auction law, Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women. The auction law itself contemplates that requiring payment for initial licenses through competitive bidding, unlike existing licensing methods such as comparative hearings or lotteries, may inhibit participation by those with limited access to capital and could further diminish opportunities for designated entities. The first nationwide auction demonstrated that a 25 percent bidding credit may not be sufficient to ensure that designated entities have the opportunity to participate where narrowband PCS values are high. The regional auctions will demonstrate whether a 40 percent bidding credit for women- and minority-owned firms combined with installment payments for eligible small businesses is sufficient to provide meaningful opportunities for designated entities at the regional level. We further propose to examine the use of measures we specified in the Fifth Report and Order to carry out Congress's directive to provide meaningful opportunities for small entities and businesses owned by women and minorities to provide PCS services. If, based on the results of the regional auction, we conclude that the 40 percent bidding credit is insufficient, we may decide that these measures, which are expressly designed to address the funding problems faced by these groups, may be necessary to achieve Congress's goals with respect to narrowband PCS.

B. Summary of Special Provisions for Designated Entities

73. While there was significant designated entity participation in the nationwide narrowband PCS auction, we are concerned that the high license values in that auction and the substantial involvement by large, incumbent firms with significant financial resources suggests that designated entities may have difficulties in competing in future narrowband PCS auctions. We recognize that larger incumbent firms are able to pay much higher license prices than smaller firms because of the significant infrastructure and cost of capital advantages these firms enjoy. Because of these factors, we believe that additional measures may be necessary to achieve Congress's mandate that we ensure the opportunity for designated entities to participate in the competitive bidding process and in the provision of spectrum-based services. In this regard, we propose additional provisions for businesses owned by woman and/or minorities and small businesses similar to those employed in the auction rules for broadband PCS.

74. To fulfill Congress's mandate that we ensure that designated entities have the opportunity to participate in providing narrowband PCS, we propose to reserve up to four MTA frequency blocks --19, 21, 22 and 24 --, and both BTA frequency blocks -- 25 and 26 -- for bidding exclusively by entities with annual gross revenues of less than $125 million and total assets of less than $500 million ("entrepreneurs' blocks"). We believe that excluding large companies from bidding in the proposed entrepreneurs' blocks, and limiting the total number of licenses that one entity can obtain in these blocks, would significantly enhance opportunities for smaller entities to become PCS providers and thereby ensure that narrowband PCS licenses will be disseminated "among a wide variety of applicants," as required by Section 309(j)(3)(B).

75. We recognize, however, that reserving blocks for bidding only by relatively small companies may not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain narrowband PCS licenses. Businesses owned by members of minority groups and women face discrimination that poses additional obstacles for these firms. Accordingly, we propose a number of related steps to assist small businesses and businesses owned by woman and/or minorities in attracting the capital necessary to obtain a narrowband PCS license.

76. First, to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions, we propose to make bidding credits available to designated entities within the entrepreneurs' blocks. More specifically, we propose to provide small businesses with a 10 percent bidding credit. Businesses owned by minorities and women would receive a 15 percent bidding credit to compensate for the substantial problems they face in attracting capital.[117] The credits would be cumulative, so that a business owned by minorities or women that also qualified as a small business would receive a 25 percent bidding credit. Second, we propose to allow most successful bidders within the entrepreneurs' blocks to pay for their licenses in installments and to "enhance" those installment payments for small businesses and businesses owned by minorities and women by varying the moratorium on principal and the interest rate. Third, we propose to continue to extend our tax certificate policies to promote participation by minorities and women in the provision of narrowband PCS. Fourth, we propose to reduce the upfront payment for all eligible bidders in the entrepreneurs' blocks from $0.02 per MHz per pop to $0.015 per MHz per pop.

77. Finally, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in Section 24.102 of the rules. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

78. The following chart highlights the major provisions proposed for businesses bidding in the proposed entrepreneurs' blocks.[118]

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[117] Although this bidding credit would be less than the bidding credit available for selected nationwide and regional licenses (25 percent and 40 percent respectively), the 15 percent bidding credit would be available within the entrepreneurs' blocks rather than in a block where all companies could participate.

[118] This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

	Bidding Credits	Installment Payments	Tax Certificates for Investors
Entrepreneurial Businesses (in excess of $40 MM and less than or equal to $125 MM in revenue and less than $500 MM in total assets)	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than $75 MM, available only in regional and MTA markets)	No
Small Businesses (not in excess of $40 MM in revenues and less than $500 MM in total assets, see ¶ 45)	10%	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%;	No
Businesses Owned by Minorities and/or Women (in excess of $40 MM and less than or equal to $125 MM in revenues and less than $500 MM in total assets)	15%	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes
Small Businesses Owned by Minorities and/or Women (not in excess of $40 MM in revenues and less than $500 MM in total assets)	25%	Interest only for 5 years; rate equal to 10-year treasury note;	Yes

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

79. The following points summarize the principal rules we propose regarding eligibility to bid in the entrepreneurs' blocks and have adopted above to qualify as a small business. In addition, they summarize the attribution rules we will propose to use to assess

whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

Proposed Financial Caps:

- Entrepreneurs' Blocks: To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than $125 million in gross revenues and less than $500 million in total assets. No individual attributable investor or affiliate may have $100 million or more in personal net worth.

- Small Business: To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have not in excess of $40 million in gross revenues. No individual attributable investor or affiliate may have in excess of $40 million in personal net worth. (Note: this is the small business definition we have adopted above). We seek comments on whether in an entrepreneur's block we should define small businesses differently.

Proposed Attribution Rules:

- Control Group. The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.

- The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.

- Other Investors. Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, will include as much as 15 percent of the voting stock).

- Passive Equity. Passive equity is limited partnership or non-voting stock interests or voting stock interests of 15 percent or less of the issued and outstanding voting stock.

- Proposed Option for Minority or Woman-Owned Applicants. If the control group (consisting entirely of women and/or minorities) owns at least 50.1 percent of the equity and, for corporations, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes no more than as 15 percent of the voting stock).

- Affiliates. The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

80. The points below summarize the two structural options proposed to be available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1 Percent Equity Option:

- If women and/or minority principals control the applicant and own at least:
  - 50.1 percent of the equity, and
  - 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
  - not more than 49.9 percent of the passive equity (which, for corporations, includes as much as 15 percent of the voting stock).

25 Percent Equity Option:

- If women and/or minority principals control the applicant and own at least:
  - 25 percent of the equity, and
  - 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
  - 25 percent or less of the passive equity (which, for corporations,includes as much as 15 percent of the voting stock).

81. We also request comment on alternatives intended to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission would enforce vigorously any requirements adopted. These proposals include a holding and limited transfer period for licensees in the entrepreneurs' blocks and repayment provisions associated with bidding credits and installment payments. These steps and our eligibility and affiliation rules are intended to ensure that the benefits of any measures we take flow to the entities Congress intended. Ultimately, we believe that we will best fulfill our statutory mandate by creating

powerful incentives for bona fide designated entities to attract the capital necessary to compete both in auctions for narrowband PCS and in the provision of service. We therefore specifically request that commenters address in detail the impact any of these alternatives would likely produce on the opportunity for designated entities to acquire narrowband PCS licenses.

D. The Entrepreneurs' Blocks

82. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.[119] The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in narrowband PCS auctions.

83. We anticipate that the results of the narrowband regional auctions as well as the comments we seek in this Notice will be relevant to our final conclusion of whether an entrepreneurs' block is appropriate in narrowband PCS. We seek comments on what results in the regional auction would or would not justify the use of an entrepreneurs' block in subsequent narrowband auctions. The $125 million gross revenue/$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees. For example, the $125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,[120] and would include virtually all of the

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[119] See H.R. Rep. No. 103-111 at 255.

[120] Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the $100 million mark in each of five consecutive years. The Commission imposes more relaxed regulatory requirements on Tier 2 LECs than on Tier 1

independently owned rural telephone companies, while excluding the largest incumbent paging licensees. Limiting the personal net worth of any individual investor or affiliate of the applicant to $100 million would prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepreneurs' blocks.

84. In determining which of the blocks in each market should constitute the entrepreneurs' blocks, we seek to make sufficient opportunity available to businesses that would qualify for the entrepreneurs' blocks and to those that would not. We seek comment on whether it would be appropriate to include all of those remaining blocks designated for bidding credits and to add one additional MTA block and one additional BTA block if we decide to adopt the proposal. We seek comment on the choice of blocks and the number of blocks that should be included in the entrepreneurs' blocks. We want to choose blocks to provide adequate amounts of spectrum and geographic territory necessary to ensure that the eligible bidders will be able to compete effectively. We believe that designating a variety of frequency blocks as entrepreneurs' blocks would satisfy the needs of those parties who believe they must have larger amounts of spectrum to compete effectively as well as the needs of other designated entities who require smaller blocks. Finally, it would not foreclose opportunities for other parties.[121]

85. Holding and Limited Transfer Period. Because we interpret the congressional goal of giving designated entities the opportunity to provide spectrum-based services to extend beyond merely obtaining a license, we seek comment on whether we should prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.[122] We further ask commenters

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LECs. See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772 (1987), Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994); Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

[121] In addition, incumbent paging licensees would have the opportunity to bid on 2,176 MTA and BTA response channel licenses reserved for existing paging licensees.

[122] We propose considering exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. Paramount Pictures, Inc., 43 FCC 453 (1949); Cf. William Penn Broadcasting, 16 FCC 2d 1050 (1969).

to address whether, for the next two to seven years of the license term, we should permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.[123] Comments should address whether any restrictions of this type would accurately balance the goal of promoting access to capital by designated entities with the need to assure the integrity of our process. During this limited transfer period, licensees would continue to be bound by the financial eligibility requirements, as set forth below.[124] In addition, a transferee or assignee who receives an entrepreneurs' block license during this period would remain subject to the transfer restrictions for the balance of the holding period.[125] Should any of these proposals be adopted, the Commission would conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

86. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain de facto and de jure control of their companies. The holding and limited transfer period upon which we seek comment, may help promote this objective. We seek comment on the effect that any rules of this sort are likely to have on the achievement of our goals of meaningful long-term participation by designated entities and how such a rule would impact the ability to raise capital.

E. Bidding Credits

87. In the Third Report and Order we adopted a 25 percent bidding credit for businesses owned by minorities and women. We concluded that the use of bidding credits would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of narrowband services.[126] And, in this Order, we

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[123] We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. See infra ¶¶ 91, 98.

[124] See infra ¶¶ 101-106. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

[125] For example, if an entrepreneurs' block authorization is assigned to an eligible business in year four of the license term, it would be required to hold that license until the original holding period expires, subject to the same exceptions that applied to the original licensee.

[126] See Third Report and Order at ¶ 72.

raised this bidding credit to 40 percent for the regional narrowband auctions. While we do not think that a bidding credit of this magnitude is required when used in conjunction with an insulated entrepreneurs' block, we continue to believe that a bidding credit is necessary to ensure that women and minority-owned businesses have the opportunity to participate in narrowband PCS. In addition, we believe that a small bidding credit is warranted to help small businesses overcome financing obstacles. Accordingly, we propose to continue to provide a bidding credits in the proposed entrepreneurs' blocks that would give small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

88. In ex parte presentations to the Commission, many commenters have indicated that, without spectrum set-asides for narrowband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. PCSD states, for example, that all of the existing large paging companies can justify much larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.[127] As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the narrowband PCS service, we propose to exclude very large businesses from bidding for licenses in the entrepreneurs' blocks. These measures would enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits can have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in entrepreneurs' blocks.

89. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in narrowband PCS.[128] In effect, the bidding credit would function as a discount on the bid price a firm would actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we propose to provide them with a slightly higher bidding credit than small businesses. Thus, women and minorities would receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it

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[127] Ex parte filing of PCSD Development Corporation (PCSD), August 9, 1994.

[128] Although we did not previously grant bidding credits to small businesses in the Third Report and Order, we now believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses, bidding credits might be a proper means to ensure that these firms have the opportunity to participate in this service.

might be impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of narrowband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups. Therefore, we propose a cumulative bidding credit of 25 percent for these groups. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a narrowband PCS system, consistent with the intent of Congress. We seek comments on these proposals.

90. As discussed below, we have also proposed to modify the definition of a minority and women-owned firm.[129] To receive a 10 percent bidding credit, we propose that a small business must satisfy the same gross revenue test adopted for installment payments. As explained more fully in the small business definition section, we propose that a consortium consisting entirely of small businesses also be eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, we propose that a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, we propose that a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

91. Repayment Policies Applicable to Bidding Credits To ensure that bidding credits benefit the parties to whom they are directed, we inquire whether we should adopt strict repayment policies: if, within the original 10-year term, a licensee applies to assign or transfer control of a license to for example, an entity that is not eligible for as a high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify would have to be paid to the U.S. Treasury as a condition of approval of the transfer. Thus, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than $40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits would entail full repayment of the original bidding credit as a condition of transfer. Small businesses also would be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the $40 million small business cap, this repayment provision would apply.[130] If such a proposal were to be adopted, we would envision that these repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding

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[129] See infra ¶¶ 107-117.

[130] See infra ¶¶ 102-106, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues caps.

credits. Nevertheless, as in the case of the holding period and transfer restrictions discussed at ¶¶88-89 above we seek comment on any effects such rules may have on the ability of designated entities to attract capital. We therefore ask commenters to address in detail whether this type of restriction would further the goal of increasing the number of designated entities participating in the provision of narrowband PCS services.

F. Installment Payments

92. A significant barrier for most businesses small enough to qualify to bid in the proposed entrepreneurs' blocks would be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.[131] In the Third Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations.[132]

93. In light of the expected substantial capital required to acquire narrowband PCS licenses, we propose that installment payments be available to most businesses that obtain narrowband PCS licenses in the proposed entrepreneurs' blocks. By allowing payment in installments, the government would in effect be extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing would promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we propose today, installment payments would be available to smaller entities that do not technically qualify as small businesses for purposes of other measures we have proposed, such as bidding credits. We believe, however, that, given the significant costs of narrowband PCS licenses and the likelihood of very large participants in the other blocks, this option would be fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.[133]

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[131] See e.g., comments of SBA Chief Counsel of Advocacy at 6, 20-21, NTIA at 27; SBAC Report at 2 (September 15, 1993).

[132] See Third Report and Order at ¶¶ 86-90.

[133] See H.R. Rep. No. 103-111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

94. Under the plan we propose here, all licensees that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks would be allowed to pay in installments for regional and MTA licenses granted in those blocks. With respect to the BTA licenses in those blocks, however, only businesses owned by women and minorities and those licensees with less than $75 million in gross revenues would be able to use installment payments.[134] This distinction is based on the expected lower costs to acquire licenses and construct systems in the BTAs. However, if we adopt our proposal to redesignate BTA licenses as nationwide or regional licenses, we propose extending installment payments on those blocks to all parties eligible for the entrepreneurs' blocks. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding $75 million would require government financing to be competitive for the BTA licenses.[135]

95. The installment payment option would enable qualified businesses to pay their winning bid over time. These businesses would still make the applicable upfront payment in full before the auction, but would be required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment would be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price would be paid in installments with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this general rule, only payments of interest would be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license.[136] We seek comment on this installment payment proposal.

96. Enhanced Installment Payments As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in

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[134] We will apply the same $500 million total assets and $100 million personal net worth standards for purposes of determining eligibility for installment payments in the BTA entrepreneurs' blocks. The attribution rules set forth with regard to eligibility to bid will also apply in all of the BTA entrepreneurs' blocks.

[135] We note that a consortium of small businesses would be eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section V.A., infra.

[136] As described in the Second Report and Order, the Commission may, on a case-by-case basis, permit a three to six month grace period within which a licensee may seek a restructuring of the payment plan.

narrowband PCS. Accordingly, we propose an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses who win licenses in the proposed entrepreneurs' blocks would be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities would be able to make interest-only payments for three years. Interest would accrue at the Treasury note rate without the additional 2.5 percent.[137] And, finally, businesses that are both small and owned by women and/or minorities would be required to pay only interest for five years. Interest would accrue at the Treasury note rate.

97. These proposed enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs would allow small businesses and companies owned by women and/or minorities to bid higher in auctions, thereby increasing their chances for obtaining licenses. In addition, it would allow them to concentrate their resources on infrastructure build-out and, therefore, it would increase the likelihood that they become viable narrowband PCS competitors. We request comment on these proposed enhancements to the installment payment plan.

98. Unjust Enrichment Applicable to Installment Payments To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we propose to retain the unjust enrichment provisions adopted in the Third Report and Order applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.[138] Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies would become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect. Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the

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[137] To be eligible for these "enhanced" installment payments, a firm would have to satisfy either of the two alternative definitions of a woman or minority-owned business, as set forth in ¶¶107-117, infra, as well as the applicable financial caps.

[138] See Third Report and Order at ¶ 89.

gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision would also apply.[139] We seek comment on these proposals.

G. Upfront Payments

99. As previously indicated in the Third Report and Order, the upfront payment requirement was designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.[140] The upfront payment ensures that bids during the course of the auction are bona fide and convey information about the value of the underlying licenses. Our standard upfront payment for narrowband PCS is $0.02 per MHz per pop. As an additional means of enhancing the opportunity of designated entities to participate in competitive bidding we propose to reduce the required upfront payment for those applicants. As we concluded in the Fifth Report and Order, we are concerned that the $0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the proposed entrepreneurs' blocks would be entitled to pay for their licenses in installments, which would require a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

100. For these reasons, we propose to reduce the upfront payment requirement to $0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and would permit them to conserve resources for infrastructure development after winning a license. Moreover, since the upfront payment is still substantial, we believe that insincere bidding would be discouraged and the Commission would have access to funds if it must collect default or bid withdrawal penalty payments.

H. Definitions and Eligibility

1. Eligibility to Bid in the Proposed Entrepreneurs' Blocks

101. As noted previously, eligibility to bid in the proposed entrepreneurs' blocks would be limited to companies that, together with their affiliates and investors, had gross revenues of less than $125 million in each of the last two years and have total assets of less than $500 million at the time their short form applications are filed. In addition, we propose to prohibit an applicant from bidding in these blocks if any one attributable individual

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[139] See infra ¶¶ 102-106, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues and total assets thresholds.

[140] Third Report and Order, ¶¶ 41-45.

investor or principal in the applicant has $100 million or greater in personal net worth at the short form application filing date.

2. Attribution Rules for the Proposed Entrepreneurs' Blocks

102. For purposes of determining whether an entity qualifies to bid in the entrepreneurs' blocks, we propose to follow the control group and attribution rules set forth with regard to eligibility to bid as a small business.[141] In particular, winning bidders would be required to identify on their long-form applications a control group that controls the applicant, owns at least 25 percent of the equity, and in the case of a corporation, holds at least 50.1 percent of the voting stock. For partnership applicants, we propose that every general partner be considered part of the group. The gross revenues and total assets of each member of the control group and each member's affiliates would be counted toward the $125 million/$500 million thresholds, regardless of the size of the member's total interest in the applicant. The $100 million personal net worth limitation would also apply to each member of the control group. We would not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as fifteen percent of the voting stock in a corporate applicant.

103. We also propose the more relaxed attribution standard set forth in ¶¶ 49-51 with regard to investors in small businesses owned by minorities and women. Specifically, we would not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as fifteen percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock. We believe that such revenue attribution would ensure that only bona fide small businesses are able to take advantage of the special provisions we have proposed, but would allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

104. In addition, we propose to allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses including the ability to bid in the entrepreneurs' block. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

105. We explain how these attribution rules would apply with regard to any holding and limited transfer period for entrepreneurs' block licensees should such rules ultimately be adopted. During this holding period, an entrepreneurs' block licensee could not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that

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[141] See supra ¶¶ 41-47.

investor's gross revenues or total assets would bring the company over the $125 million gross revenues/$500 million total assets thresholds, or if that investor's personal net worth exceeds the $100 million personal net worth cap. Similarly, while individual members of the control group could change (if it would not result in a transfer of control of the company), the control group would have to maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.[142] A company would be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.[143]

106. We seek comment on these proposed eligibility requirements for the entrepreneurs' blocks. In particular, parties should discuss the equity and control requirements for the control group and investors in both the corporate and partnership context. In addition, commenters should discuss the alternative option for women and minority-owned companies and the ability of small businesses to form consortia. With regard to all of these issues, parties are asked to comment on the proposals' impact on the ability of entities to obtain financing as well as on the Commission's goals of deterring shams and fronts.

3. Definition of Women and Minority-Owned Business

107. As discussed above, we have proposed steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the narrowband PCS service.[144] We previously adopted a tax certificate program for women and minorities to allow more sources of potential funding, and in this Order have relaxed the attribution standard used to determine eligibility as a qualified small business.

108. For purposes of implementing these steps, we propose to depart from the definition of a minority and woman-owned firm that was adopted in the Third Report and

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[142] A minority or woman-owned company would have to continue to adhere to the attribution rules applicable to it, set out above.

[143] These rules would continue to apply in this manner throughout the license term with regard to a firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

[144] We propose to use the same criteria set forth in the Second Report and Order, and consider the members of the following groups "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses would be eligible for special measures only if the minority and women principals are also United States citizens.

Order. We have adopted relaxed attribution standards for businesses owned by women and minorities for purposes of qualifying for small business provisions (¶ 46). We are proposing relaxed standards for businesses owned by women and minorities to qualify for the entrepreneurs' blocks. In the Third Report and Order, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least a 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. Third Report and Order at ¶68; 47 C.F.R. § 1.2110(b)(2). For future narrowband PCS auctions, we propose to retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we propose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as fifteen percent of the voting stock. In addition, provided that certain restrictions are met, we propose to allow women and minority-owned firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

109. We emphasized in the Third Report and Order that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a fully-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, in the Second Report and Order that different standards that meet the same objectives may be appropriate in other contexts. Second Report and Order at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptionally great financial resources believed to be required by narrowband PCS applicants, we conclude that it may be appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

110. We propose therefore to allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the Second Report and Order, which requires the minority and/or female principals to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-voting stock may be held, or stock that includes no more than fifteen percent of the voting interests.[145] For

[145] For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporation's voting stock and 94 shares of its non-voting stock. Under this scenario,

partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity. We ask commenters specifically to address whether the proposed fifteen percent voting interest limitation strikes the correct balance, or whether a higher percentage would facilitate capital formation without unduly contributing to a proliferation of shams. In addition, the Second Report and Order, all investor interests would be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally would be considered to have a present effect and would be treated as if the rights thereunder already have been fully exercised.[146] We recognize that the requirement that other investors own only passive interests would be a departure from the definition of a minority or women-owned business adopted in the Second Report and Order, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement may be appropriate as an additional safeguard. In addition, we seek comments on whether these rules as currently framed may affect the ability of legitimate designated entities to obtain the capital needed to participate in the auction.

111. As a second proposed option, women and minority-owned firms would be able to sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirement that they hold at least 25 percent of the equity. Two other investors could each own 34 shares of non-voting stock and fifteen shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 32 shares of non-voting stock and fifteen shares of the voting stock, or 23.5 percent of the equity. The remaining 4 shares of voting stock may be sold to other investors.

112. Whichever option is chosen, we would require establishment of a "control group" for women and minority-owned firms in much the same way we did for purposes of eligibility

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eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

[146] As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated entity. See Second Report and Order at ¶ 277.

to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees would have to identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has de jure and de facto control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

113. We believe that a modification of our 50.1 percent equity requirement would best achieve the Congressional objective of providing effective and long-term economic opportunities for women and minority-owned firms in narrowband PCS. At the same time, we propose to maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option could not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction would apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, would help to ensure that control truly remains with the women and minority designated entities.

114. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than a 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total assets caps. In these contexts, no additional restrictions would be necessary, because women and minority-owned applicants, like other applicants, would be eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it would not be necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm would not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than a 25 percent passive interest. In circumstances in which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction would be appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

115. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains de facto as well as de jure

control of an applicant.[147] We propose to apply those rules equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership and cross-ownership rules in this broadcast context, we do not propose to adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. See In the Matter of Clarification of Commission Policies Regarding Spousal Attribution, 7 FCC Rcd. 1920 (1992)

116. We also note here that we are proposing to depart from the provision in the Third Report and Order that bars publicly traded companies from qualifying as minority and woman-owned businesses for purposes of participating in auctions. Most of the steps proposed to assist these designated entities in this Further Notice (e.g., bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there would be a financial limit on the size of participants. Because of the large capital entry costs of narrowband PCS, we now believe that even publicly traded companies owned by women and minorities that qualify to bid in entrepreneurs' blocks require additional measures, such as bidding credits and installment payments, to be able to participate successfully.

117. As noted above, we propose that applicants owned by women and minorities must meet the limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations would not apply, however, to all measures designed to assist applicants owned by minorities and or women. The tax certificate policy applies to all narrowband PCS licenses and would not be limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. But minority and women-owned firms would have to satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates; that is, they would be subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of an Affiliate

118. In the Second Report and Order, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the Fifth Report and Order, we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for narrowband PCS to be used when designated entities must include "affiliates" to determine their eligibility for special designated entity provisions. In the Second Memorandum Opinion and Order that we adopted in this docket, we incorporate into our generic auction rules the affiliation standards that we established for narrowband PCS in the Fifth Report and Order. We propose to apply these affiliation standards would also apply to narrowband PCS for purposes of determining any of the above described, sized-based eligibility criteria for

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[147] See supra ¶ 112.

designated entities seeking special treatment under the provisions adopted herein. These standards would give applicants clear guidance regarding the relationships that we will attribute for purposes of applying any of our sized-based eligibility criteria.

I. Limit on Licenses Awarded in Entrepreneurs' Blocks

119. The special provisions which we propose for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B). Therefore, in proposing the financial assistance measures set forth in this Further Notice, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We therefore propose steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

120. To achieve a fair distribution of the benefits intended by Congress, we propose a limit on the total number of licenses within the entrepreneurs' blocks that a single entity could win at auction. In setting this limit, we would avoid imposing a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient nationwide or regional services. Specifically, we propose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks. These licenses could be in any combination of frequency blocks. Such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it would allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

121. Further, this limitation would apply only to the total number of licenses that may be won at auctions in these proposed entrepreneurs' blocks; it would not be an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we would consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

J. Redesignation of Certain Narrowband PCS Spectrum Blocks

122. Finally, we are concerned that there are companies that would be eligible for an entrepreneurs' block license that may desire larger license areas than MTAs and BTAs. It appears that over half of the bidders in the nationwide auction would have qualified for an entrepreneurs' block license. As a result, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in Section 24.102 of the rules. Doing so would give designated entities an opportunity to bid on a larger and more valuable

license under the rules for entrepreneurs' blocks. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. Commenters should also address the appropriate premium we should adopt for comparison of combinatorial and BTA license bids if we allow combinatorial bidding. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSE

A. Regulatory Flexibility Analysis

123. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the Memorandum Opinion and Order and the Commission's initial regulatory flexibility analysis for the Further Notice is as follows:

Memorandum Opinion and Order -- Final Analysis

124. Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, see generally 5 U.S.C. § 603, within the Notice of Proposed Rule Making in this proceeding, and published Final Regulatory Flexibility Analyses within the Second Report and Order (at ¶¶ 299-302) and the Third Report and Order (at ¶¶ 91-94). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

125. Summary of the Issues Raised by the Public Comments. In regard to the specific narrowband PCS issues addressed by this Third Memorandum Opinion and Order, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

126. Significant Alternatives Considered. Although, as described in (B) above, no comments were received pertaining to narrowband PCS, the Second Report and Order and Third Report and Order addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

Further Notice -- Initial Analysis

127. Reason for the Action. The purpose of the Further Notice is to implement competitive bidding rules and regulations rules consistent with the Commission's competitive bidding authority that will carry out the statutory mandates that certain designated entities,

including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

128. Objectives of this Action. The Omnibus Budget Reconciliation Act of 1993 and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

129. Legal Basis. Authority for the for the Further Notice can be found in the Omnibus Budget Reconciliation Act of 1993 and in Sections 2(a), 4(i) 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152 (a), 154 (i), 303(r), 309(i) and 309(j).

130. Reporting, Recordkeeping and Other Compliance Requirements. The proposals under consideration in this Further Notice include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

131. Federal Rules Which Overlap, Duplicate or Conflict With These Rules. None.

132. Description, Potential Impact, and Number of Small Entities Involved. The rule changes proposed in this Further Notice could effect smaller entities if they have mutually exclusive applications for initial licenses or permits for narrowband PCS licenses. The Further Notice proposes to establish certain narrowband PCS spectrum blocks for bidding exclusively by smaller entities and to provide installment payments and bidding credits to certain eligible entities bidding within those blocks.

133. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives. The Further Notice proposes certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

B. Ex Parte Rules

134. This is a non-restricted notice and comment rule making proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

135. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 16, 1994 and reply comments on or before October 3, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of this document may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, DC 20554, telephone (202) 857-3800.

D. Ordering Clause

136. Accordingly, IT IS ORDERED, That the petitions for reconsideration ARE GRANTED to the extent described above and DENIED in all other respects.

137. IT IS FURTHER ORDERED, that Part 24 of the Commission's Rules IS AMENDED as set forth in the attached Appendix. IT IS ORDERED, that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX
RULES

Part 24 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.129 is revised to read as follows:

Section. 24.129 Frequencies.

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (*) will be eligible for bidding credits of 25 percent, and all licenses indicated with an (**) will be eligible for bidding credits of 40 percent, as set forth in Section 24.309(b) of this Part if competitive bidding is used to award such licenses.

(a) Eleven frequencies are available for assignment on a nationwide basis as follows:
(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00-940.05 and 901.00-901.05 MHz;
Channel 2: 940.05-940.10 and 901.05-901.10 MHz;
Channel 3: 940.10-940.15 and 901.10-901.15 MHz;
Channel 4: 940.15-940.20 and 901.15-901.20 MHz; and,
Channel 5: 940.20-940.25 and 901.20-901.25 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40-930.45 and 901.7500-901.7625 MHz;
Channel 7: 930.45-930.50 and 901.7625-901.7750 MHz; and,
Channel 8: 930.50-930.55 and 901.7750-901.7875 MHz;*

(3) Three 50 kHz unpaired channels:

Channel 9: 940.75-940.80 MHz;
Channel 10: 940.80-940.85 MHz; and,

Channel 11: 940.85-940.90 MHz.*

(b) Six frequencies are available for assignment on a regional basis as follows:
(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 12: 940.25-940.30 and 901.25-901.30 MHz; and,
Channel 13: 940.30-940.35 and 901.30-901.35 MHz.**

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55-930.60 and 901.7875-901.8000 MHz;
Channel 15: 930.60-930.65 and 901.8000-901.8125 MHz;
Channel 16: 930.65-930.70 and 901.8125-901.8250 MHz; and,
Channel 17: 930.70-930.75 and 901.8250-901.8375 MHz.**

(c) Seven frequencies are available for assignment on a MTA basis as follows:
(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40 -901.45 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.*

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.*

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.*

Note 1: Operations in markets or portions of markets which border other countries, such as Canada and Mexico, will be subject to on-going coordination arrangements with neighboring countries.

3. Section 24.130 is amended by revising paragraphs (b) and (c) to read as follows:

* * * * *

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

A: 901.9000-901.9125 MHz;
B: 901.9125-901.9250 MHz;
C: 901.9250-901.9375 MHz; and
D: 901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a BTA basis:

E: 901.9500-901.9625 MHz;
F: 901.9625-901.9750 MHz;
G: 901.9750-901.9875 MHz; and
H: 901.9875-902.0000 MHz.

4. Section 24.303 is revised to read as follows:

Sec. 24.303 Competitive Bidding Mechanisms.

(a) Sequencing. The Commission will establish and may vary the sequence in which narrowband PCS licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) Minimum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish by Public Notice a suggested opening bid or a minimum opening bid on each license.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in

connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted one activity rule waiver during each stage of an auction, or one automatic waiver during a specified number of bidding rounds. The Commission may change by Public Notice the number and frequency of such automatic activity rule waivers for a specific auction.

(g) Bidder Identification During Auctions. The Commission may choose, on an auction-by-auction basis, to release the identity of the bidders associated with bidder identification numbers. The Commission will announce by Public Notice before each auction whether bidder identities will be revealed.

5. Section 24.308 is revised to read as follows:

Sec. 24.308 License Grant, Denial, Default, and Disqualification.

(a) Unless eligible for installment payments and/or a bidding credit, each winning bidder is required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid, defaults on a payment or is disqualified will be subject to the penalties specified in Section 1.2109 of this Chapter.

6. Section 24.309 is revised to read as follows:

Sec. 24.309 Designated Entities.

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and businesses owned by members of minority groups and/or women as defined in §§ 24.320(b) and 24.320(c) of this Subpart.

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments. Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bid on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in Section 1.2110(d) of this Chapter.

(2) Bidding Credits. Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses: (1) the nationwide licenses on Channel 5, Channel 8 and Channel 11; (2) all MTA licenses on Channel 19, Channel 22, Channel 24; and (3) all BTA licenses on Channel 26. This bidding

credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In section 24.129 above, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

(3) Tax Certificates. Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a narrowband PCS license(s), and any non-controlling investor who purchases an interest in a narrowband PCS license held by a business owned by members of minority groups and/or women within the first year after license issuance, may, upon the sale of such investment or interest, request from the Commission a tax certificate. Any narrowband PCS licensee who assigns or transfers control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate.

(c) Short-Form Application Certification; Long-Form Application Disclosure.

(1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (Form 175) that they are eligible for those preferences pursuant to this section.

(2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications --

(i) identify each member of the applicant's control group, regardless of the size of the member's total interest in the applicant, and each member's minority group or gender classification, if applicable;

(ii) disclose the gross revenues of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control group); and

(iii) certify that the personal net worth of the applicant (if an individual), each affiliate and each person that hold an interest in the applicant is less than $40 million.

(d) Audits. Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(e) Definitions. The terms *affiliate*, *business owned by members of minority groups and women*, *consortium of small businesses*, *control group*, *gross revenues*, *members of minority groups*, *passive equity*, *personal net worth*, and *small business* used in this section are defined in § 24.320.

(f) Unjust Enrichment. Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the following unjust enrichment provisions:

(1) If a small business paying for a narrowband PCS license in installment payments seeks to transfer a license to a non-small business entity during the term of the license, the remaining principal balance must be repaid as a condition of the license transfer.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change as a condition of approval. Increases in gross revenues that result from equity investments that are not attributable to the licensee under § 24.320(b)(2)(iv), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

7. Section 24.320 is added to read as follows:

§ 24.320 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.309-24.315 of this subpart, unless otherwise specified in those sections.

(b) Small Business; Consortium of Small Businesses.

(1) A *small business* is an entity that (i) together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years; (ii) has no attributable investor or affiliate that has a personal net worth of $40 million or more; (iii) has a control group all of whose members and affiliates are considered in determining whether the entity meets the $40 million annual gross revenues and personal net worth standards; and (iv) such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as defined in subsection (c)) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor holds more than 49.9 percent of passive equity in the entity.

(2) Attribution and Aggregation of Gross Revenues and Personal Net Worth.

(i) Except as specified in paragraphs (iii) and (iv), the gross revenues of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or

licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is a small business.

(ii) The personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if less than $40 million, shall not be considered for purposes of determining whether the applicant (or licensee) is eligible to bid as a small business.

(iii) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(iv)(a) The gross revenues and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered so long as (1) such person holds no more than 25 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's or control group; and (2) the applicant has a control group that owns at least 25 percent of the applicant's total equity and, if a corporation, holds at least 50.1 percent of the applicant's voting interests.

(b) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant shall not be considered so long as (1) such person holds no more than 49.9 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's control group; and (2) the applicant has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's total equity and, if a corporation, at least 50.1 percent of the applicant's voting interests.

Note: Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business.

(c) Business Owned by Members of Minority Groups and/or Women. A *business owned by members of minority groups and/or women* is an entity (i) that has a control group composed 100 percent of members of minority groups and/or women who are United States Citizens, and (ii) such control group owns and holds 50.1 percent of the voting interests, if a corporation, and (A) owns and holds 50.1 percent of the total equity in the entity, provided that all other investors hold passive interests; or (B) holds 25 percent of the total equity in the entity, provided that no single other investor holds more than 25 percent passive equity interests in the entity. In a partnership, all general partners must be members of minority

groups and/or women. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(d) Gross Revenues. *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(e) Personal Net Worth. *Personal net worth* shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor.

(f) Members of Minority Groups. *Members of minority groups* includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(g) Passive Equity. *Passive equity* shall mean (i) for corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(h) Control Group. A *control group* is an entity, or a group of individuals or entities, that possesses de jure control and de facto control of an applicant or licensee, and as to which the applicant's or licensee's charters, articles of incorporation, bylaws, agreements and any other relevant documents (and amendments thereto) provide (i) that the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation; (ii) that the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation; (iii) that, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and (iv) that the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee.

> Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the control group is widely dispersed (see, e.g., § 24.720 (e) (2) (iii)).

(i) Affiliate. (1) Determinations regarding whether an individual or entity will be considered an *affiliate* of (a) an applicant or (b) a person holding an attributable interest in an applicant

under paragraph (b) (2) will be made pursuant to the general affiliation rules set forth in section 24.720 (l) of this part.

8. Section 24.406 is revised to read as follows:

Sec. 24.406 Filing of Narrowband PCS applications, fees, and numbers of copies.

(a) As prescribed by Sections 24.305, 24.307, and 24.409 of this part, standard formal application forms applicable to the narrowband PCS may be obtained from either:

(1) Federal Communications Commission, Washington, DC 20554; or

(2) by calling the Commission's Forms Distribution Center, (202) 418-3676.

(b) Applications for the initial provision of narrowband PCS service must be filed on FCC Form 175 in accordance with the rules in Section 24.305 and Part 1, Subpart Q. In the event of mutual exclusivity between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long form applications on FCC Form 401 for initial narrowband PCS licenses. Mutually exclusive applications filed on Form 175 are subject to competitive bidding under those rules. Narrowband PCS applicants filing Form 401 need not complete Schedule B.

(c) All applications for Narrowband PCS radio station authorizations (other than applications for initial provision of narrowband PCS service filed on FCC Form 175) shall be submitted for filing to: Federal Communications Commission, Washington, DC 20554, Attention: Narrowband PCS Processing Section. Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with Sec. 0.401(b).

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Narrowband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Sec. 1.743. Unless otherwise provided by the FCC, filings of five pages or less are exempt from the requirement to submit on microfiche, as well as emergency filings like letters requesting special temporary authority. Those filing any amendments, correspondence, pleadings, and forms must simultaneously submit the original hard copy which must be stamped "original". In addition to the original hard copy, those filing pleadings, including pleadings under Section 1.2108 of the rules shall also submit 2 paper copies as provided in Sec. 1.51 of the rules.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm x 176 mm) or 5 x 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images)of the first fiche blank for in-house identification purposes.

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche:

(i) The name of the applicant;

(ii) The type of application (e.g. nationwide, regional, MTA, BTA, response channel);

(iii) The month and year of the document;

(iv) Name of the document;

(v) File number, applicant identification number, and call sign, if assigned; and

(vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

Each microfiche copy of pleadings shall include:

(A) The month and year of the document;

(B) Name of the document;

(C) Name of the filing party;

(D) File number, applicant identification number, and call sign, if assigned;

(E) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable). Abbreviations may be used if they are easily understood.

9. Section 24.422 is revised to read as follows:

Sec. 24.422 Amendment of application for Narrowband Personal Communications Service filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications. These are defects which may not be cured. See also Section 1.2105.

(b) In the Narrowband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175, to make ownership changes or changes in the identification of parties to bidding consortia, provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for any of the same licenses as the applicant. Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105.

10. Section 24.429 is amended by deleting paragraph (b) and redesignating paragraphs (c) and (d) as (b) and (c), respectively, to read as follows:

Sec. 24.429 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of Sec. 1.2105 (Bidding Application and Certification Procedures; Prohibition of Collusion), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

(1) A major change in the ownership of an applicant to which Sec. 24.423 (c) and 24.423 (g) would apply or which would cause the applicant to lose its status as a designated entity under Section 24.309, or

(2) The individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

(b) If the amendment would cause the applicant to lose its status as a designated entity under Section 24.309, the applicant must notify the Commission of this change in status and must comply with the obligations imposed by Sections 24.308, including increasing its down payment to the level required as a non-designated entity.

(c) The provisions of Section 22.927 will apply in the event of the individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

11. Section 24.430 is revised to read as follows:

Sec. 24.430 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with Section 1.2108 and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of Secs. 1.41 through 1.52 except where otherwise provided in Section 1.2108;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying, previously filed application. This does not apply to petitioners who gain standing because of the major amendment.

(c) parties who file frivolous petitions to deny may be subject to sanctions including monetary forfeitures, license revocation, if they are FCC licensees, and may be prohibited from participating in future auctions.

FCC 94-269

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION AND
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 20, 1994 Released: November 7, 1994

Comment Date: December 16, 1994
Reply Comment Date: January 17, 1995

By the Commission: Commissioners Quello, Barrett, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. In 1991 and 1992, the Commission adopted policies and rules to permit an expanded role by local exchange carriers (LECs) in the provision of video services in their telephone service

areas.[1] Prior to these orders, telephone companies were restricted by Commission rules from exceeding the carrier-user relationship with video programmers. Thus, telephone companies were generally limited in their service areas to providing "channel service," a common carrier delivery service linking a cable operator's headend to subscriber premises.[2] In its 1991 and 1992 orders, the Commission established a regulatory framework for telephone companies to deliver video programming on a common carrier basis, as well as provide various additional unregulated services, consistent with the cross-ownership restrictions imposed by the Cable Communications Policy Act of 1984 (1984 Cable Act).[3] This regulatory framework is called "video dialtone." In this Order, we consider petitions for reconsideration of our 1992 Second Report and Order, as well as a joint petition for rulemaking filed by the Consumer Federation of America (CFA) and National Cable Television Association (NCTA) (Joint Petition), seeking video dialtone-specific cross-subsidy rules.

2. As discussed more fully below, we take various actions here to strengthen our video dialtone policies. Among the more significant actions, we first reaffirm the basic video dialtone regulatory construct adopted in the Second Report and Order. LECs offering video dialtone service must make available a common carrier platform that provides sufficient capacity to serve multiple video programmers, and may not allocate all or substantially all analog capacity to a single "anchor programmer." Second, we clarify and modify our video dialtone policy to help ensure that telephone ratepayers do not have to bear the costs of video dialtone. These measures should also protect cable operators from potential anticompetitive actions by LECs, stemming from LEC incentives and opportunities to price video dialtone service

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1 See Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (First Report and Order), recon., 7 FCC Rcd 5069 (1992), aff'd, National Cable Television Association v FCC, No. 91-1649 (D.C. Cir. August 26, 1994) (NCTA v FCC); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Second Report and Order), appeal pending sub nom., Mankato Citizens Telephone Company, No. 92-1404 (D.C. Cir. filed September 9, 1992).

2 See Second Report and Order, 7 FCC Rcd at 5787, para. 10 n.21.

3 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. § 533(b)(1) (1984) (1984 Cable Act).

unreasonably low relative to the costs of providing such service. For instance, we set forth specific guidance for application of our pricing rules to ensure that interstate video dialtone rates cover video dialtone costs -- both the incremental costs of video dialtone and a reasonable allocation of shared plant costs and overheads. We also establish a data collection program to monitor the impact of video dialtone deployment on local rates as well as on separations results. Third, we modify our assertion of exclusive jurisdiction over all video dialtone services to recognize that states have jurisdiction over intrastate video dialtone services. This modification should provide a sound jurisdictional basis for the exercise of federal and state regulatory authority over video dialtone services. Finally, we issue a Third Further Notice of Proposed Rulemaking (Third Further Notice) seeking additional information and comment on various issues not adequately addressed in the record currently before us.

3. We conclude that video dialtone, as modified, will eliminate unnecessary regulatory barriers to competitive entry and to investment. In particular, by establishing a framework within which telephone companies may play an expanded role in the video marketplace, consistent with the 1984 Cable Act and the public interest, video dialtone will eliminate artificial barriers to competition and disincentives to investment by telephone companies in critical telecommunications facilities. Equally important, our video dialtone framework will eliminate artificial incentives to invest in facilities that are not needed to provide telecommunication services demanded by consumers. As a result, video dialtone will help achieve the three goals we have articulated throughout this proceeding: facilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming.

4. These goals continue to guide our development of video dialtone policy, just as they did two years ago, when we adopted the Second Report and Order. Shortly after we adopted that order, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).[4] Congress there concluded that, in the absence of effective competition, regulation of cable service rates is necessary to protect consumer interests.[5] While

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4 Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act) (amending the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. (Act or Communications Act)).

5 47 U.S.C. § 521(b)(4). For example, Congress found that without competition there was "undue market power for the cable operator, as compared to that of consumers and video programmers,"

the 1992 Cable Act thus substantially re-regulates the cable industry, that Act reflects Congress's preference for relying on competition, rather than regulation, to protect consumer interests. For example, the 1992 Cable Act specifically exempts from rate regulation cable systems that are subject to effective competition.[6] In addition, the legislative history of the Act stresses the need for policies that encourage the development of video services competition.[7] That Act also requires the Commission to report annually on the status of competition in the market for the delivery of video programming.[8]

5. In September 1994, the Commission issued its first annual report on competition in the delivery of video programming. While we found that alternative distribution media have made substantial strides over the last several years, the report concludes that "[t]he market for the distribution of multichannel video programming remains heavily concentrated at the local level, and for nearly all consumers cable television is the only provider of multichannel video programming." It also concludes that "[c]able systems continue to have substantial market power at the local distribution level."[9] Thus, the basic market structure that existed at the time of the Second Report and Order and that prompted passage of the 1992 Cable Act -- the dominance of cable systems in the multichannel distribution of video programming -- remains largely unchanged.

6. We also note that Congress recently considered, but did not enact, legislation that would have opened the door to new competition in a number of communications markets, including the local exchange and video services marketplaces. This proposed legislation included provisions to facilitate telephone companies' entry into the video programming marketplace. The absence of such legislation only heightens the need for a regulatory framework,

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and that "the cable television industry has become a dominant nationwide video medium." 47 U.S.C. § 521(a)(2-3).

6 47 U.S.C. § 543. See also 47 U.S.C. § 521(b)(2) ("It is the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible . . .").

7 See S. Rep. No. 92, 102d Cong., 2d Sess. 1, 18, reprinted in 1992 U.S. Code Cong. & Admin. News 1133, 1133, 1151; H.R. Rep. No. 628, 102d Cong., 2d Sess. 27, 30, 44 (1992).

8 47 U.S.C. § 548(g).

9 Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 94-48, FCC 94-235 (released September 30, 1994), at 5.

consistent with existing law, that eliminates unnecessary barriers to LEC investment in video delivery systems. We believe that video dialtone, as modified herein, represents a framework that would be consistent with the goals of the legislation.

II. BACKGROUND

7. In 1991, the Commission issued a Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry that considered the public interest benefits of allowing telephone companies to participate in the video marketplace through video dialtone.[10] The Further Notice tentatively concluded that a video dialtone policy would further the Commission's public interest goals of increased competition, improved infrastructure, and greater diversity in video programming.[11] The Further Notice described video dialtone and proposed a general regulatory framework to govern its implementation. As part of the regulatory framework, we proposed to amend our cross-ownership rules to permit telephone companies to provide video dialtone and related services. We tentatively concluded that these proposed amendments were fully consistent with the cross-ownership provisions of the 1984 Cable Act.[12]

8. In the First Report and Order, we issued interpretive rulings that, under the 1984 Cable Act, neither a LEC offering video dialtone nor its programmer-customers are required to obtain a cable television franchise.[13] We also concluded that interexchange carriers are not subject to the cross-ownership prohibition.[14] In the Second Further Notice of Inquiry, we asked whether we should recommend to Congress the repeal of the cross-ownership ban in light of the proposed video dialtone regulatory model. We also sought comment on what safeguards we should impose if LECs are permitted to provide video programming directly to subscribers. Finally, we asked for comment on whether other

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10 See generally First Report and Order; supra note 1.

11 See supra para. 3.

12 47 U.S.C. § 533(b). See also infra notes 72-73.

13 See First Report and Order, 7 FCC Rcd at 324-8, paras. 50-52. These rulings were upheld on judicial review. See NCTA v FCC, No. 91-1649 (D.C. Cir. August 26, 1994).

14 Id. at 322-3, para. 46.

statutory or regulatory changes would expand investment incentives for video dialtone.[15]

9. In the Second Report and Order, we modified our rules to permit LECs to provide video dialtone to the public, consistent with the statutory cross-ownership restrictions,[16] the regulatory framework we have developed for non-video enhanced services, and additional requirements designed to achieve the public interest goals enumerated above. Under the video dialtone framework we adopted, LECs are permitted to offer, on a nondiscriminatory basis, a basic common carrier video delivery platform that must accommodate multiple video programmers and expand as demand increases so as not to thwart realization of our public interest goals.[17] In addition, LECs may enter into certain non-ownership relationships with video programmers that have a certain nexus to the common carrier platform. For example, LECs may provide unregulated gateways to video programmers using the platform to enhance the ability of end users to select and receive video programming made available by those video programmers.[18] We concluded that existing safeguards designed to prevent improper

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15 First Report and Order, 7 FCC Rcd at 302, para. 2. The history of the Commission's rules regarding the ownership of cable television systems and provision of video programming by local telephone companies is set forth more fully in Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849, paras. 2-9 (1988). See also Telephone Company/Cable Television Cross-Ownership Restrictions (Notice of Inquiry), 2 FCC Rcd 5092 (1987).

16 47 U.S.C. § 533(b).

17 We defined "basic platform" as a common carriage transmission service, coupled with the means by which consumers can access any or all video program providers making use of the platform. Second Report and Order, 7 FCC Rcd at 5783, para. 2 n.3.

18 Second Report and Order, 7 FCC Rcd at 5784, para. 2 n.5. A gateway is a service that enables end users to select among a number of communications services, most commonly enhanced services. Id. Our rules define "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (1993). Enhanced services are not regulated under Title II of the Communications Act. Id.

cross-subsidies would apply to LEC provision of video dialtone service, and that it was not necessary to alter existing accounting, cost allocation and jurisdictional separations rules. We also permitted LECs to acquire an increased non-cognizable financial interest (up to 5%) in video programmers. We declined to adopt financial or other special incentives to promote video dialtone.

10. In addition, we recommended to Congress that it amend the 1984 Cable Act to permit LECs to provide, subject to appropriate safeguards, video programming directly to subscribers in their telephone service areas.[19] Finally, we proposed to amend the rural exemption to the cross-ownership rules to permit telephone companies to provide video programming directly to subscribers in areas of less than 10,000 persons.[20]

11. Twenty-three petitions for reconsideration of the Second Report and Order have been filed with the Commission. A variety of parties, including consumer groups, telephone companies, cable television interests, broadcasting interests, and state regulatory bodies, have asked the Commission to reconsider, clarify, or modify the Second Report and Order.[21]

12. In addition, CFA and NCTA filed the Joint Petition asking us to adopt video dialtone-specific cross-subsidy rules.[22] We

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19 Second Report and Order, 7 FCC Rcd at 5847, para. 135.

20 Id. at 5855, para. 150. This Order does not address the Commission's proposal to change the rural exemption.

21 Several parties filed petitions or other pleadings late. We accept these filings and treat them as informal comments in the interest of achieving a complete record.

22 In May 1994, a coalition of five consumer organizations filed two separate petitions asking us to: (1) ensure that video dialtone facilities are deployed in a nondiscriminatory manner and that services are made available universally, and (2) commence a rulemaking to modify the Section 214 application process to ensure equitable introduction of video dialtone and public involvement in the application process. The coalition consists of the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, and the National Council of La Raza. See Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities (filed May 23, 1994); Petition for Rulemaking to Adapt the Section 214 Process to the Construction of Video Dialtone Facilities (filed May 23, 1994). Comments on the petitions were due July 12, 1994.

address the petitions for reconsideration and the Joint Petition below.[23]

13. In the first section of our discussion, we address telephone company provision of video dialtone. This section discusses the video dialtone platform requirements, specifically, the capacity and expandability requirements and restrictions prohibiting LECs from acquiring cable systems in their telephone service areas for the provision of video dialtone. We also discuss telephone company activities permissible under video dialtone, i.e., the ownership affiliation standards and rules governing non-ownership relationships between LECs and video programmers, as well as the definition of video programming. The last portion of the first section addresses the extent of our jurisdiction over video dialtone services. The second section addresses our regulatory framework and safeguards for the provision of video dialtone service. Specifically, we examine our authority to require a Section 214 application before a LEC constructs and operates a video dialtone facility, as well as requests for streamlining or eliminating the Section 214 requirement for video dialtone, and for delaying consideration of pending Section 214 applications for video dialtone. We also address cross-subsidy and pricing issues, our two-level regulatory framework for video dialtone, and safeguards, including joint marketing and Customer Proprietary Network Information (CPNI) issues. In the third section we discuss the issue of preferential access to the video dialtone platform for certain classes of video programmers and whether to establish special incentives to accelerate LEC deployment of broadband facilities. The last section of our discussion in this Order addresses our recommendation to Congress that it amend the 1984 Cable Act to permit LECs to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards.

14. We also initiate a Third Further Notice seeking additional information and comment on various issues.

Replies were due July 27, 1994. The issues raised in the petitions deserve serious consideration, but we have not yet had an opportunity to review fully all of the information and arguments submitted in response to them. We are committed to careful review of the record and plan to act on these matters promptly.

23 A list of parties filing petitions for reconsideration or pleadings in response to a petition is appended as Appendix A. A list of parties filing pleadings regarding the Joint Petition is set forth in Appendix B. Pleadings filed in response to the Joint Petition are identified as such herein. Pleadings in response to a reconsideration petition are referred to simply as comments or replies.

Specifically, we seek information and comment on: (1) mechanisms for addressing the apparent short-term constraints on the expandability of analog channel capacity; (2) modifications to our prohibition on acquisition of cable facilities and a corresponding modification to our non-ownership affiliation rules; (3) proposals that we require or permit LECs to provide preferential video dialtone access or rates to certain classes of video programmers; and (4) possible changes to our rules governing pole attachments and conduit rights.

15. The video dialtone framework that we describe in this Order applies the 1984 Cable Act cross-ownership ban. We note that four courts have ruled the 1984 Cable Act ban on telephone company provision of video programming unconstitutional.[24] The record in this proceeding does not address, and we therefore here do not decide, what framework should apply to LECs that provide video programming directly to subscribers.

III. SUMMARY

16. This Order clarifies or modifies the Second Report and Order in several respects. These modifications are consistent with our intent to eliminate artificial regulatory barriers to competitive entry and to efficient investment, thereby facilitating competition in video delivery services, investment in infrastructure, and greater diversity in video programming. First, we elaborate on our requirement that LECs expand the capacity of their video dialtone platform as demand increases by clarifying that LECs must expand to the extent technically feasible and economically reasonable. To monitor LEC capacity and ensure that LECs expand in accordance with this standard, we require LECs operating video dialtone systems to provide us with notice of anticipated or actual capacity shortfalls and of plans for addressing them.

17. Second, we hold that our prohibition on the acquisition by LECs of cable facilities in their service areas for the provision of video dialtone does not preclude LECs from leasing an in-region cable operator's drop wires, provided that any such lease is limited in scope and duration and does not permit LECs to impede the development of additional competition in video delivery services.

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24 See The Chesapeake and Potomac Telephone Co. of Virginia v. United States, 830 F.Supp. 909 (E.D. Virginia 1993), appeal pending; US West, Inc. v. United States, 855 F.Supp. 1184 (W.D. Wash. 1994), appeal pending; BellSouth Corp. v. United States, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); Ameritech Corp. v. United States, Nos. 93-C-6642 and 94-C-4089 (N.D. Ill. Oct. 27, 1994).

18. Third, we elaborate on our ownership affiliation rules by clarifying that they restrict LEC ownership interests in video programmers and not video programming. We define video programmers as entities that provide video programming directly to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering" of the video programming or the price, terms, or conditions on which video programming is offered to subscribers.

19. Fourth, we modify our non-ownership affiliation rules by: (1) permitting LECs to provide enhanced and other nonregulated services in connection with any video programming offered in an area substantially served by a video dialtone platform; (2) permitting LECs to enter into certain other types of non-ownership relationships with video programmers who are not franchised cable operators in the LEC service area, regardless of whether the LEC has built a video dialtone platform in the area served by those programmers; (3) prohibiting LECs from exceeding the carrier-user relationship in their telephone service area with cable operators, except to provide enhanced or other nonregulated services, as permitted above, or to lease drop wires; and (4) generally prohibiting LECs from entering into non-ownership relationships that would permit any video programmer to participate in operating the basic video dialtone platform.

20. Fifth, we modify our jurisdictional determination that we have exclusive jurisdiction over all video dialtone services. We hold instead that we have exclusive jurisdiction only over video communications that have been transmitted over radio waves or across state lines.

21. Sixth, we deny requests to eliminate, streamline, or delay the Section 214 process, but hold that LECs may file generic Section 214 applications for those aspects of proposed video dialtone platforms that do not require case-by-case consideration.

22. Seventh, we grant the CFA and NCTA Joint Petition for rulemaking to the extent it requests that we begin a rulemaking to establish a price cap basket for video dialtone services. We deny the petition for rulemaking to the extent it asks that we issue a Notice of Proposed Rulemaking proposing service-specific cost allocation rules for video dialtone service and establish immediately a Federal-State Joint Board to address jurisdictional separations issues. We require carriers to: (1) establish subsidiary accounting records to capture video dialtone revenues, investments, and expenses; (2) file revisions to their Cost Allocation Manuals (CAMs) for their provision of nonregulated video dialtone services; and (3) obtain any necessary waivers of our Part 69 rules prior to tariffing video dialtone service offerings. We establish specific guidance regarding the application of the price caps new services test to video dialtone tariffs. In addition, we

direct the Common Carrier Bureau to develop a data collection program to monitor the effects of video dialtone on separations results and on local telephone rates. We also announce our intention to open an inquiry into the impact of the introduction of new network technologies on the jurisdictional separations process.

23. Eighth, we add video dialtone service to the basic service categories for which we require that LECs report installation and maintenance activities. In addition, while we maintain existing CPNI rules for video dialtone at this time, we direct the Bell Operating Companies (BOCs) and GTE to provide additional information about the types of CPNI to which they will have access as providers of video dialtone service so that we may further assess whether these rules properly balance the various interests at stake. Finally, in light of the detailed examination we give in this Order to our video dialtone policies and rules, and our continuing work on major video dialtone issues through the data request and Third Further Notice, we cancel next year's planned reexamination of video dialtone. We otherwise affirm our holdings in the Second Report and Order.

24. Our Third Further Notice seeks additional information and comment in four areas. First, we seek comment on proposals for addressing the apparent technical and economic constraints on the provision and expansion of analog channel capacity. We seek comment, in particular, on two possible proposals: (i) a proposal advanced by GTE in its Section 214 application to make extensive use of digital capacity; and (ii) "channel sharing" mechanisms, through which video programmers would be able to share analog channels, thereby permitting a more efficient use of analog channel capacity. Second, we seek comment on criteria for evaluating the viability of additional wire-based video competition in particular markets. We propose to use these criteria to modify our ban on the acquisition by telephone companies of cable facilities in their telephone service areas for use in the provision of video dialtone. We also propose to permit LECs and cable operators jointly to construct a video dialtone platform in any area in which we lift the acquisition prohibition. Third, we seek information and comment on whether we should require or permit LECs to provide preferential access or discounted rates to commercial broadcasters and/or to certain types of not-for-profit programmers. Fourth, we request comment on whether we should adopt additional rules with respect to pole attachments and conduit rights.

IV. DISCUSSION

A. Telephone Company Provision of Video Dialtone

1. Requirements for a Video Dialtone Platform

a. Sufficient Capacity to Serve Multiple Service Providers

Background

25. In the Second Report and Order, the Commission required that video dialtone systems be offered on a nondiscriminatory common carrier basis[25] and contain sufficient capacity to serve multiple video programmers.[26] The Commission also determined that the common carrier platform must have the ability to "expand as demand increases so as not to become a bottleneck that will thwart realization of our public interest goals."[27] The Commission directed telephone companies seeking to provide video dialtone to describe in their Section 214 applications how their proposed construction and operation of the basic platform will meet this requirement.

Pleadings

26. Southwestern Bell Telephone (SWBT) asks us to eliminate the requirement that LECs offer capacity to serve multiple video programmers and expand that capacity as demand increases. It contends that this requirement places LECs at an unfair competitive disadvantage vis-a-vis cable operators, who are the incumbent video service providers and are subject to no such requirements. It argues, further, that insofar as many of the technologies cited by the Commission as potential video dialtone technologies do not offer unlimited capacity, the Commission's capacity requirements are inconsistent with its avowed intent to avoid dictating video dialtone technology.[28] It asserts that the technology necessary to meet these requirements does not currently exist and that, therefore, the requirements are likely to delay, if not eliminate, the ability of LECs to provide video dialtone.[29]

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25 Second Report and Order, 7 FCC Rcd at 5783, para. 2.

26 Id. at 5797, para. 29.

27 Id. at 5797-98, para. 30.

28 SWBT Petition at 9.

29 Id. at 8-10; SWBT Reply Comments at 3-4.

27. SWBT argues also that the Commission's capacity requirements ignore economic realities.[30] SWBT maintains that video programmers face significant capital and operating costs and will not be able to attract a sufficient number of subscribers necessary for survival unless they can each offer a full range of programming, like the competing cable operator. SWBT argues that the vast majority of markets will be unable to support more than one programmer on the video dialtone network. SWBT asserts that it should not be required to expend substantial sums of money to provide capacity for programmers who, according to its market research, are not likely to be viable. SWBT also argues that it should be permitted to allocate most of its analog channel capacity to a single video programmer, who would then be able to compete viably with the incumbent cable operator. It suggests that the Commission's capacity goals could be met if this video programmer made these analog channels available on a resale basis to other programmers, who would use digital channels for their other services.[31]

28. In an ex parte letter dated July 7, 1994, PacTel, BellSouth, and GTE join SWBT in arguing that a viable competitive offering must include an "anchor programmer," which would offer a service package comparable to that offered by cable operators.[32] They argue that LECs should be given flexibility in allocating channels, including the ability to allocate all analog channels to one anchor programmer. They argue that such an allocation would help smaller programmers, who could use the anchor programmer's product as a foundation with which to associate their own offerings.

29. The Office of Communications of the United Church of Christ (OC\UCC) argues that video dialtone should be more than just "channel service" and that the Commission's capacity and expansion requirements are necessary to foster diversity of viewpoints.[33]

Discussion

30. We now affirm our requirement that telephone companies wishing to offer video dialtone service must make available a basic common carrier platform offering sufficient capacity to serve

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30 See SWBT ex parte letter, May 20, 1994; SWBT ex parte letter, June 1, 1994.

31 See SWBT ex parte letter, May 20, 1994.

32 See PacTel, GTE, BellSouth, and SWBT ex parte letter, July 7, 1994.

33 OC\UCC Petition at 1-2.

multiple video programmers. We also affirm our expandability requirements, subject to the modification discussed below.

31. In adopting a common carrier regulatory model for video dialtone, we found that this model was critical to our determination that video dialtone is in the public interest.[34] We stated that the common carrier platform will serve as the foundation through which multiple video programmers can provide services to consumers, and is thus critical to achieving increased competition in the delivery of video services and greater diversity of video programming.[35] We also noted that the basic common carrier platform will provide an important check against unreasonably discriminatory treatment of video programmers by telephone companies providing video dialtone service.

32. No one has persuaded us that these findings should be revised. On the contrary, we continue to believe that maintaining common carrier obligations on the basic video dialtone platform is fundamental to achieving our public interest goals. This requirement will enable multiple video programmers to obtain access on nondiscriminatory terms to LEC video delivery capabilities, thereby fostering new and diverse sources of video programming and generating competition in the provision of such programming to end users.[36] Such competition will be generated both among users of the video dialtone platform and among such users and video programmers that use other systems, such as cable systems, to distribute their products to end users in the same geographic area.

33. We also affirm our requirement that video dialtone common carrier platforms offer sufficient capacity to serve multiple video programmers. Without this requirement, video dialtone would not be as effective in achieving our goal of fostering a diversity of information sources to the public. This goal was and remains one of the key purposes of our video dialtone policy.[37] Indeed, without this requirement, it is not clear that video dialtone service would differ materially from channel service, which telephone companies

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34 Second Report and Order, 7 FCC Rcd at 5797, para. 29.

35 Id.

36 See NCTA v. FCC, No. 91-1649, slip op. at 18 (D.C. Cir. Aug. 26, 1994) ("[V]ideo dialtone is a common carrier service, the essence of which is an obligation to provide service indifferently to all comers -- here, to provide service to all would-be video programmers").

37 Second Report and Order, 7 FCC Rcd at 5783-84, para. 1-2; see supra para. 3.

were able to provide to cable operators even before we adopted the video dialtone framework.

34. We are not convinced by SWBT's arguments that our capacity requirement is inconsistent with our desire to remain technology-neutral with respect to video dialtone deployment, or that the technology necessary for LECs to meet this requirement is not yet available. As an initial matter, our stated preference for remaining technology-neutral applies to technologies that are consistent with our basic video dialtone requirements; we are not technology-neutral with respect to technologies that cannot meet those requirements. Second, contrary to SWBT's assertion, LECs have numerous options available to them for meeting the capacity requirement. Indeed, we have already approved six video dialtone applications, involving varying technologies and architectures.

35. We also reject requests that LECs be permitted to allocate all or substantially all analog capacity to a single "anchor programmer." These requests appear to be premised on the assumption that only analog capacity allows a viable alternative to cable service in the short-term. To grant these requests would thus be inconsistent with the common carrier model for video dialtone and our requirement that LECs offer sufficient capacity to accommodate multiple video programmers.[38]

36. Finally, we affirm our expandability requirement, subject to the modification discussed below. This requirement, we believe, compounds the benefits of video dialtone by ensuring greater diversity in the sources of video programming and fostering infrastructure development. Absent this requirement, the initial programmer-customers of video dialtone might exhaust all video dialtone capacity, thereby preventing new programmers from using these systems. In addition, the expandability of video dialtone systems is a critical factor in reducing the ability of LECs to discriminate in their provision of video dialtone service. Specifically, it precludes LECs from limiting capacity or avoiding further investment in their video dialtone systems in order to insulate certain video programmers from competition.

37. We are not persuaded by SWBT's argument that it is unfair to apply capacity and expandability requirements to LECs but not

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38 Some LECs, such as Bell Atlantic and NYNEX, apparently do not share the assumption that only analog channels can viably compete with cable programming in the short-term. These LECs have proposed substantially all-digital systems. See, e.g., New Jersey Bell Telephone Company, 9 FCC Rcd 3677 (1994), recon. pending, petitions for stay pending (New Jersey Bell); New England Telephone and Telegraph Company (NYNEX), File No. W-P-C-6982 (filed July 8, 1994).

cable operators. Cable service is subject to a different statutory and regulatory regime than video dialtone service. The regime governing cable service imposes obligations that do not apply to video dialtone, including franchise requirements and other obligations imposed by the 1984 and 1992 Cable Acts.[39] SWBT has not shown that the burdens imposed by our common carrier framework would prevent LECs from competing in the video marketplace.

38. While we affirm our capacity and expandability requirements, we take this opportunity to elaborate on the scope of the expandability obligation. As critical as this obligation is to our video dialtone construct, it would not be reasonable to require LECs to expand to meet all demand, regardless of technical and economic considerations. Indeed, such a requirement might well discourage LECs from constructing and operating video dialtone systems because of the risk of excessive idle investment. We therefore clarify that, under our video dialtone requirements, LECs are required to expand whenever, and to the extent that, expansion is technically feasible and economically reasonable. A LEC may not refuse to expand simply because it does not wish to permit video programmers to offer certain types of video programming on its video dialtone system. We will address claims by LECs that expansion is not technically feasible and economically reasonable on a case-by-case basis in light of all relevant circumstances. In this review process, we will look to all relevant information and data, including the capacity offered on other video dialtone systems, data relating to demand for video delivery in the LEC's region or in comparable regions, and technical data. To monitor LEC progress in expanding capacity and to ensure that LECs expand in accordance with the standards set forth herein, we require LECs to notify the Chief of the Common Carrier Bureau of any anticipated or existing capacity shortfall and of plans for addressing such shortfall. Such notice must be provided within thirty days after the LEC becomes aware of an anticipated capacity shortfall or within five days after denying capacity to a video programmer, whichever occurs first. To the extent a LEC concludes that expansion is not technically feasible or economically reasonable at that time, the LEC must explain in detail the basis for its determination and indicate when it anticipates expansion would be technically feasible and economically reasonable.

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39 See NCTA v. FCC, No. 91-1649 (D.C. Cir. Aug. 26, 1994). As noted, the video dialtone framework set out in this Order applies to LECs that do not provide video programming directly to subscribers in their telephone service area. Therefore, we do not address the extent to which LECs providing video programming directly to subscribers in their telephone service area may need a franchise.

39. We recognize that, at least in the short term, it may not be feasible for LECs to meet all demand for capacity due to technical limits on the expandability of analog capacity and the costs associated with using digital capacity. On the other hand, to the extent digital transmission can supplement analog transmission, the capacity of video dialtone systems increases significantly. In the Third Further Notice, we seek comment on a proposal for expediting the viability of digital capacity. We also seek comment on proposals that would allow more efficient use of analog capacity.[40]

b. Acquisition of Cable Facilities

Background

40. In the Second Report and Order, the Commission prohibited LECs from purchasing cable facilities in their service area for the provision of video dialtone.[41] The Commission found that permitting such acquisitions would diminish the incentives that cable and telephone companies have to compete directly. The Commission also found that permitting such acquisitions could create incentives for cable companies to evade local franchising requirements. At the same time, however, the Commission retained its rules allowing LECs to acquire cable facilities in their telephone service areas in order to lease those facilities back to the local cable operator[42] for use in providing cable service pursuant to Title VI of the Communications Act.

Pleadings

41. Several LECs, NCTA, and the New England Cable Television Association (NECTA) seek reconsideration of the prohibition on the acquisition of cable facilities for the purpose of offering video dialtone.[43] They argue that LECs should be able to purchase cable facilities, not only for the purpose of providing leasebacks, but

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40 See Third Further Notice, infra, paras. 268-275.

41 Second Report and Order, 7 FCC Rcd at 5837-38, paras. 109-111.

42 Id. at 5838. See 47 C.F.R. § 63.54(d)(3).

43 See Ameritech Petition at 11-15; Bell Atlantic Petition at 6-7; BellSouth Petition at 8-9; NYNEX Petition at 7-8; PacTel Petition at 4-7; SWBT Petition at 5-6; US West Petition at 11-13; NCTA Petition at 16-18; GTE Petition at 3 n.4. See also NCTA Reply Comments at 7-8; NECTA Comments at 5-6; USTA Comments at 14-15; Ameritech Reply Comments at 3; SWBT Comments at 1-2; Bell Atlantic Reply Comments at 4-5 & n.16; PacTel Reply Comments at 2-5; and GTE Reply Comments at 9 n.27.

also for use in providing video dialtone. Many of these petitioners contend that, given the common carrier nature of video dialtone, the Commission's goals could be more economically and efficiently achieved if the prohibition did not exist.[44] They argue that there can be meaningful competition among video programmers, diversity of programming, and infrastructure improvement over a single, common carrier wire.[45] Other commenters assert that the ban on acquisitions will force consumers and ratepayers to bear the cost of building an unnecessary and redundant system.[46] In addition, they argue, building duplicate facilities will slow the development of video dialtone and the broadband network.[47] Several petitioners argue that the prohibition could deter the widespread deployment of video dialtone by eliminating markets unable to support more than one system.[48] Some also contend that the added costs of constructing redundant systems contradict the Commission's stated goal of making video dialtone available at a reasonable cost.[49] Finally, NYNEX asserts that there is no valid statutory basis for the ban.[50]

42. NCTA and NECTA state that LECs have a competitive advantage over cable operators because LECs are not subject to

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44 See Ameritech Petition at 11-15; Bell Atlantic Petition at 6-7; BellSouth Petition at 8-9; PacTel Petition at 4-7; NYNEX Petition at 8; US West Petition at 11-13; and SWBT Petition at 5-6. See also NYNEX Reply Comments at 4-6; Ameritech Reply Comments at 3; Bell Atlantic Reply Comments at 4-5; Bell Atlantic Comments at 4; PacTel Reply Comments at 1-5; SNET Comments at 2-5; and USTA Comments at 14-15.

45 See PacTel Petition at 4-7; Ameritech Petition at 13; PacTel Comments at 1-5; PacTel Reply Comments at 2-5; SNET Comments at 2-5; USTA Comments at 14-15.

46 NCTA Petition at 16-18; Bell Atlantic Petition at 6-7; SWBT Petition at 34; PacTel Petition at 4-5; Ameritech Petition at 14. See also SWBT Petition at 5-6.

47 See NCTA Petition at 16-18; Bell Atlantic Petition at 6-7. See also Bell Atlantic Comments at 4; Bell Atlantic Reply Comments at 5; PacTel Petition at 5-7; PacTel Comments at 1-5. But see CFA/CME Comments at 9-11.

48 BellSouth Petition at 8-9; Ameritech Petition at 13.

49 Ameritech Petition at 13; SWBT Petition at 3-5.

50 NYNEX Petition at 8.

local franchise requirements.[51] As a result, they claim, cable companies must have the ability to avoid losses by selling their cable systems to local telephone companies.[52]

43. Ameritech and US West maintain that the restriction is at odds with the Commission's decision to permit LECs to acquire cable facilities and lease them back to a local franchise operator. They argue that in the case of a leaseback, the cable operator maintains its monopoly over video services, whereas if the telephone company uses the cable company's facilities for video dialtone, the market is opened to a multitude of video program providers. Southern New England Telephone Company (SNET) maintains that the restriction on acquisitions conflicts with the Commission's intent to remain neutral with respect to video dialtone technology.[53]

44. A few petitioners ask us to modify or clarify the prohibition in the event that we do not eliminate it altogether.[54] Bell Atlantic asks us to clarify that the prohibition applies only to the purchase of entire cable systems, and that LECs may acquire or use particular cable facilities, such as wires from the "curb to the home," also referred to as "drop wires," or customer premises wiring, when it is more economical than building duplicative facilities.[55] BellSouth asks us to clarify that the restriction does not preclude LECs from acquiring either excess capacity from an existing cable facility or an entire facility in markets where there already are two cable operators.[56] Likewise, GTE asserts that the purchase of an existing cable facility in a nonexclusive franchise environment does not discourage diversity of program sources or permit evasion of franchise requirements. GTE asks us to reconsider the blanket ban on acquisitions and to review individual proposals on a case-by-case basis through the section 214 process.[57]

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51 NCTA Petition at 16-18; NCTA Reply Comments at 7-8; NECTA Comments at 5-6.

52 NCTA Petition at 16- 18; NCTA Reply Comments at 8.

53 SNET Comments at 2-5.

54 Bell Atlantic Petition at 6-7; BellSouth Petition at 8-9; GTE Petition at 3 n.4.

55 Bell Atlantic Petition at 6-7; Bell Atlantic Reply Comments at 5 n.16.

56 BellSouth Petition at 9.

57 GTE Petition at 3 n.4.

45. The Consumer Federation of America and Center for Media Education (CFA/CME), National Association of Telecommunications Officers and Advisors, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties (Coalition of Local Governments or CLG), National Association of Broadcasters (NAB) and Action for Children's Television and Henry Geller (ACT) support retention of the acquisition ban.[58] They argue that the ban is essential to prevent LECs from merely substituting one video services monopoly for another. CFA/CME argue that facilities-based competition is needed if consumers are to have access to diverse services and programming at reasonable prices. They assert, further, that facilities-based competition could eliminate the need for cable rate regulation. NAB and ACT add that LEC purchases of cable systems could not only eliminate competition in video services, but a viable source of competition in residential local telephone services.[59] CLG argues that the benefits of the local franchise system would be lost if cable companies are permitted to sell their facilities to a LEC.[60]

46. NAB argues that, while it is possible that some markets may be unable to support both a cable and a video dialtone system, no LEC has shown that the complete elimination of the acquisition ban is necessary to spur video dialtone implementation nationwide. It argues that any exceptions to the ban should thus be established through the waiver process. Similarly, it opposes BellSouth's proposal that acquisitions of overbuilder facilities be authorized, claiming that these situations as well are best addressed through waiver applications. It also opposes BellSouth's request that LECs be permitted to purchase excess capacity from cable operators. It argues that, since multiple cable companies generally provide service within a local exchange carrier's service area, and since not all of these operators would necessarily have excess capacity, a LEC relying on excess capacity would not likely be able to provide ubiquitous service. Additionally, citing provisions of the

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58 CFA/CME Comments at 9-11; CLG Comments at 5-6; NAB Comments at 13-15; ACT Petition at 13 n.11.

59 NAB Comments at 14-15; ACT Petition at 13 n.11. NAB argues that while the Commission's Expanded Interconnection proceeding may foster local exchange competition for large users, the cable industry "represents the only realistic possibility for competition to telcos in residential wireline services." NAB Comments at 14-15.

60 CLG Comments at 5-6.

Communications Act, NAB challenges NYNEX's assertion that the ban has no statutory basis.[61]

47. NAB also responds to NCTA's assertion that the prohibition is unfair to cable companies. NAB argues that new compression technology, coupled with the use of fiber optics in system upgrades, will enable even the most archaic cable systems to expand capacity significantly and thereby compete viably with LEC video dialtone systems. It argues that monopolist cable operators should not be provided a "golden parachute" that enables them to escape competition.

Discussion

48. We now substantially affirm our decision in the Second Report and Order to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone.[62] We believe that generally retaining the ban will benefit the public by promoting greater competition in the delivery of video services, increasing the diversity of video programming, and advancing the national communications infrastructure. At the same time, however, we recognize that the ban may effectively preclude the deployment of video dialtone systems in markets that cannot support an additional wired video delivery system and could in those markets impede our goal of eliminating regulatory barriers to investment. In the Third Further Notice below, we seek information and comment that would permit us to develop criteria for identifying those markets.[63] We also propose to amend our rules so that these criteria serve as the basis for either an automatic exception to the ban or a presumption that the ban should not apply.

49. In general, opponents of the ban assert that it is an inefficient and counterproductive means of implementing video dialtone, and one that is likely to deter widespread deployment of video dialtone.[64] Contrary to these assertions, we believe that

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61 NAB Comments at 13-14, citing §§ 601(6) and 628 of the Act (enacted as part of the 1992 Cable Act). See also CFA/CME Comments at 11.

62 Second Report and Order, 7 FCC Rcd at 5837-38, paras. 109-111.

63 See Third Further Notice, infra paras. 276-79.

64 See Ameritech Petition at 11-15; Bell Atlantic Petition at 6-7; BellSouth Petition at 8-9; NYNEX Petition at 7-8; PacTel Petition at 4-7; SWBT Petition at 5-6; US West Petition at 11-13; NCTA Petition at 16-18; GTE Petition at 3 n.4. See also NCTA Reply Comments at 7-8; NECTA Comments at 5-6; USTA Comments at 14-15;

retaining the ban in areas where facilities-based competition is viable will spur the development of competitive wire-based video delivery systems, thereby offering significant benefits to consumers. First, the added competition will likely provide a check on both cable and video dialtone rates. LECs that charge too much for video dialtone delivery services will face the risk that video programmers will forego video dialtone service and rely on cable systems for distribution of their product. To the extent that competition can provide a check on video dialtone rates, video programmers will be able to lower their rates to consumers. This, in turn, would constrain cable rates.[65] Second, competition between cable operators and LECs would give both incentives to invest in infrastructure and develop new and innovative services to increase the attractiveness of their products to consumers. Third, the availability of additional distribution systems would offer increased channel capacity, thereby fostering greater diversity of programming options for consumers. Retaining the ban could also facilitate the development of competitive local telephone networks by cable operators.[66]

50. By contrast, if we eliminate the ban, LECs might seek to acquire cable systems in their service areas to eliminate competition in the provision of video delivery services. They might also have incentives to acquire cable facilities to eliminate a likely competitor in the provision of local telephone services. At the same time, elimination of the ban would unacceptably increase cable operators' incentives to move their video programming to a LEC's video dialtone system, rather than make the changes necessary to respond effectively to competition.[67] We

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Ameritech Reply Comments at 3; SWBT Reply Comments and Comments at 1-2; Bell Atlantic Reply Comments at 4-5 & n.16; PacTel Reply Comments at 2-5 and GTE Reply Comments at 9 n.27.

65 In fact, we anticipate that, as LEC video dialtone services are deployed, cable operators may be able to demonstrate that they are subject to "effective competition" and thus not subject to rate regulation by the Commission, state, or franchising authority. See Section 623(a)(2) of the 1992 Cable Act, 47 U.S.C. § 543(a)(2).

66 Just as we believe that full and fair competition in the provision of video services would serve the public interest, we believe that heightened competition in local telephone services would be beneficial, and we strongly support removal of restrictions that limit such competition.

67 Consistent with the common carrier nature of the basic video dialtone platforms, we do not preclude in-region cable operators from becoming customers on these platforms. However, as a result of the ban, it may not be economically feasible for them to do so.

therefore disagree with parties who argue that eliminating the ban would allow market forces to dictate the deployment of video dialtone technology.

51. We also disagree with those who argue that our ban is inconsistent with our policy of permitting LECs to acquire cable facilities for leasing to the local franchised cable operator. These parties ignore that, in the case of leaseback arrangements (i.e., channel service), the cable operator continues to provide cable television service and remains subject to franchise requirements and the other provisions of Title VI of the Act. Only by moving its video programming to the video dialtone platform can a cable operator avoid such requirements, and as noted, our ban reduces the incentives of cable operators to do so. In addition, we disagree with NYNEX's assertion that we lack authority to implement the ban. We believe that the ban falls well within our authority under Title II of the Act to ensure that common carrier services are provided in a manner that is consistent with the public interest.[68]

52. We recognize that prohibiting telephone company acquisitions of in-region cable systems may affect the cost of deploying video dialtone systems. We believe, however, that, at least where facilities-based competition is viable, the benefits of the ban outweigh the costs. We also recognize that video dialtone, by itself, could foster infrastructure development, competition among video programmers, and diversity of video programming. It is, in part, for this reason that we propose to modify the ban in markets that cannot sustain additional wire-based competition. In other markets, however, competing video distribution systems offer the prospect of even greater benefits than a single video dialtone system. Finally, we understand that our ban could prevent failing cable companies from selling their facilities to the video dialtone provider. We are not persuaded, however, that our policy will cause undue hardship to cable companies. First, we have no reason

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In particular, unless a cable operator using video dialtone could sell its facilities to a third party, that operator would have to recover both video dialtone charges and the cost of its embedded investment in its cable system from end user revenues, and still compete with other video programmers, including other programmer-customers of the video dialtone provider. As discussed below, the restrictions we place on non-ownership relationships between LECs and cable operators in the LECs' telephone service area should further reduce the incentives of cable operators to move their programming to a video dialtone system. See infra para. 95.

68 See 47 U.S.C. §§ 201-205, 214. See also Title VI of the Act, including §§ 601(6), 623, and 628, which reflect Congress's goal of promoting competition in the multichannel video programming market.

to assume that cable operators will be unable to compete effectively with programming services provided over video dialtone systems. Second, we propose to amend our ban to permit cable system acquisitions by LECs in markets that cannot sustain additional wire-based competition. Under this proposal, cable system owners would be able to sell their facilities to a LEC in those markets in which they would be least likely to find another buyer for them. Any remaining burden imposed by our policy is more than outweighed by its significant benefits.

53. We do not adopt BellSouth's recommendation that LECs be permitted to purchase excess capacity from cable operators. We believe, given the inherent difficulty of identifying excess capacity and the reasons that excess capacity might exist, that any rule attempting to implement such a policy would be extremely difficult to administer and subject to abuse. Moreover, as a matter of policy, we seek to encourage cable operators to use any "excess capacity" as outlets for additional programming. Allowing LECs to purchase that capacity might have the unintended effect of creating an artificial shortfall of capacity on cable systems.[69]

54. We also conclude that allowing telephone companies to lease cable company drop wires, if the lease is limited in scope and duration, would not be inconsistent with the prohibition on the acquisition of cable facilities and the goals underlying that prohibition or with our other video dialtone policies. As discussed, our prohibition on acquisitions of in-region cable facilities is intended generally to encourage the development of competing LEC and cable video delivery systems. We do not believe that permitting LECs to lease drop wires from a cable operator for a limited term of three years on a non-exclusive basis will impede the realization of this goal. In particular, we do not believe that any revenues that a cable operator may derive from such leases would be sufficient to affect materially its decision to use video dialtone or provide a competitive transmission service.[70] Moreover, permitting LECs to lease cable drops could accelerate the delivery of video dialtone services to end users and thus increase competition in the video marketplace. Therefore, we do not prohibit such leasing arrangements, provided they are executed for non-renewable terms no longer than three years. At the conclusion of the three-year period, LECs are prohibited from acquiring the cable drop wires.

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69 See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, FCC 94-38 at paras. 22-23, 37, 40, 238 (1994).

70 See supra note 67.

55. We also prohibit LECs from acquiring exclusive rights to use cable drops. Specifically, LECs may not unreasonably restrict the access of any video programmer to leased cable drops,[71] nor may they restrict cable operators from providing to third parties drops not covered by the LEC lease. We will require any LEC proposing to lease cable drop wires to describe in its Section 214 video dialtone application the material terms of that lease, including the cost of the lease to the LEC. We will scrutinize these terms to ensure that they are reasonable and, in particular, do not undermine our goal of promoting competitive wire-based video systems.

2. Telephone Company Activities Permissible under Video Dialtone

a. Ownership Affiliation Standards

Background

56. In the Second Report and Order, the Commission increased from 1% to up to 5% the permissible ownership interest of telephone companies in video programmers.[72] The Commission concluded that this increase was not inconsistent with the statutory restriction on telephone company provision of video programming, which does not expressly specify a particular ownership standard.[73] The Commission

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71 The nonexclusivity rule is intended to prevent LECs from dominating use of the wires and limiting the ability of end-users to choose among video service providers. For example, if a video dialtone subscriber decides to purchase cable service in addition to or instead of video dialtone, the LEC must allow the cable operator to use any leased drop wires in providing service to that subscriber.

72 The 1% ownership limitation was contained in Note 2 to Section 63.54(b) of the Rules and applied to stockholders who were officers or directors or who directly or indirectly owned 1% or more of the outstanding voting stock of a corporation with more than 50 stockholders. See 47 C.F.R. § 63.54 (b) note 2 (1991). As amended, the rule applies to "partnership interests, direct ownership interests, and stock interests in a corporation, where such stockholders are officers or directors or who directly or indirectly own 5 percent or more of the outstanding stock, whether voting or non-voting." See 47 C.F.R. § 63.54(e)(1) (1993).

73 Under the 1984 Cable Act, common carriers are prohibited from providing video programming directly to subscribers in their telephone service areas, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. 47 U.S.C. § 533(b)(1).

further concluded that this slight increase in permissible ownership interest would encourage telephone company participation in the video marketplace without increasing the risk of anticompetitive behavior.[74]

Pleadings

57. Seventeen of the 23 petitioners seek reconsideration of the new ownership affiliation standards. Some petitioners argue that we should not have changed the rules at all; others argue that we did not change them enough and seek further liberalization of the ownership restrictions.

58. Petitioners seeking a return to the 1% standard assert that the 1984 Cable Act codified this standard and that the Commission therefore lacked authority to change it.[75] They argue, further, that any increase in permissible telephone company ownership in video programmers heightens the likelihood that telephone companies will engage in discriminatory conduct to favor their own video programming.[76] They argue that the Commission's conclusion that LECs would not discriminate was based on the questionable assumption that capacity on the basic video dialtone platform would be unlimited. They argue that, if, in fact, only a limited number of programmers are able to access the platform at one time, LECs are likely to favor affiliated programmer access and seek out programming that does not compete with affiliated programs.[77] NAB contends that the Commission will be unable, in any event, to enforce its ownership regulations because the rules do not impose reporting requirements.[78]

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74 Second Report and Order, 7 FCC Rcd at 5801, paras. 35-36.

75 CFA/CME Petition at 13-18; CLG Comments at 4; NCTA Petition at 10-13, Reply Comments at 2; NECTA Comments at 2-3. In their Comments, CFA/CME take a less definitive position, stating that "[w]hile the Cable Act does not specify explicitly the ownership interest necessary for ownership to occur ... CFA and CME believe that the Cable Act implicitly holds that a cognizable ownership interest exists at 1% ownership because that was the level in effect when Congress codified the Commission's ownership rules in the Cable Act of 1984." CFA/CME Comments at 6.

76 CFA/CME Petition at 19-23, Comments at 3; OC/UCC Petition at 4. See also CLG Comments at 4-5; NYC Petition at 2-4; NECTA Comments at 2-3.

77 CFA/CME Petition at 22; OC/UCC Petition at 4. See also NARUC Petition at 13.

78 NAB Petition at 6.

59. LECs, opposing a return to the 1% ownership standard, deny that Congress codified that standard or that a 5% standard increases the risk of discrimination.[79] LECs maintain that it is the cable companies, not LECs, that are the incumbent monopoly providers of video services, and that LECs therefore lack the ability to discriminate in the provision of video dialtone.[80] They also note that the common carrier framework adopted for video dialtone prohibits discrimination by LECs among video programmers.[81] They argue that any discrimination would be revealed in the tariff review process or could be addressed in the Section 208 complaint process.[82] They note, further, that the largest LECs are subject to special nonstructural safeguards that further protect against any anticompetitive conduct.[83] They assert that video programming is just another enhanced service and need not be subject to onerous ownership restrictions, especially given that LECs are allowed full ownership interests in other enhanced services.[84]

60. Many LECs argue that the Commission did not go far enough in increasing the permissible level of LEC ownership in video programmers. They maintain that a more liberal standard would provide necessary incentives for LECs to participate in video dialtone provisioning, while increasing the diversity of video programming.[85] Some argue that, if LECs are unable to develop

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79 See, e.g., NYNEX Reply Comments at 2-4; USTA Comments at 7.

80 See, e.g., USTA Comments at 8-9; Ameritech Reply Comments at 5-6. See also SWBT Reply Comments at 1-4.

81 Ameritech asserts that deployment of video dialtone systems based upon broadband switching eliminates all interim concerns over potential discriminatory conduct. Ameritech Comments at 8.

82 NYNEX Reply Comments at 2-4; Ameritech Reply Comments at 5. See also Second Report and Order, 7 FCC Rcd at 5827, para. 89.

83 NYNEX Reply Comments at 2-4; Ameritech Reply Comments at 6. See Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), (BOC Safeguards Order), vacated in part and remanded, California v. Federal Communications Commission, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. 12743, 12774-5 (9th Cir. Oct. 18, 1994) (1994 U.S. App. LEXIS 29001) (California v. FCC). See also Second Report and Order, 7 FCC Rcd at 5828, para. 90.

84 NYNEX Reply Comments at 2-4. See 47 C.F.R. § 64.702 (1993).

85 PacTel Petition at 20-22; UTC Petition at 2; GTE Petition at 12-14; USTA Comments at 7; SWBT Comments at 1-6; SNET Comments at 5; Ameritech Reply Comments at 6; Bell Atlantic Reply Comments at

their own programming and are thus dependent on the whims of established programmers, with their substantial links to large cable operators, LECs may not be able to secure quality programming for their video dialtone facilities.[86] They argue that, contrary to the Commission's assertion, a 5% ownership limit is not likely to enable LECs to provide the capitalization necessary to foster development of new, independent programming.[87] They argue that incentives to invest in video dialtone are further diminished to the extent LECs are largely restricted to common carrier returns and do not have an opportunity to share in the programming revenue stream.[88]

61. Several LECs assert that the Commission must increase the noncognizable ownership level above 5% in order to conform its rules to the cross-ownership provisions of the 1984 Cable Act.[89] They argue that the 1984 Cable Act merely prohibits LECs from "controlling" video programmers whereas the Commission's ownership affiliation rules have the broader purpose of preventing the "potential for influence or control."[90] Some LECs urge adoption of ownership attribution standards similar to the Commission's cable cross-ownership restrictions and the broadcast multiple ownership

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2-3. SWBT argues that because existing cable companies already have monopoly or near monopoly control over video service distribution to most households, restricting local telephone company participation will only impede development of competition. SWBT Petition at 3-5. See also Ameritech Petition at 7-8; Bell Atlantic Petition at 3-4; NYNEX Petition at 4-5; PacTel Petition at 18-22; SWBT Petition at 6-8; UTC Petition at 1-4; US West Petition at 6-9; GTE Petition at 12-14; BellSouth Petition at 6-7; SNET Comments at 5.

86 GTE Petition at 12-14; Ameritech Petition at 7. LECs deny that their concerns over access to quality programming are addressed by provisions of the 1992 Cable Act that preclude exclusive contracts between cable operators and programmers. Ameritech Comments at 7; Bell Atlantic Reply Comments at 3.

87 Ameritech Petition at 7, Comments at 7; GTE Petition at 12-14; SWBT Petition at 7. See Second Report and Order, 7 FCC Rcd at 5801, para. 35.

88 Ameritech Petition at 7, Comments at 7; GTE Petition at 12-14.

89 USTA Comments at 5-6; Ameritech Comments at 6-7; Bell Atlantic Petition at 2-3, Comments at 2.

90 Ameritech Comments at 6-7; PacTel Petition at 19; NYNEX Petition at 4-5; Bell Atlantic Petition at 2-3, Comments at 2; SWBT Petition at 6-7; USTA Comments at 5-6.

attribution standards contained in Sections 76.501 and 73.3555 of the Commission's rules, respectively.[91] Most assert that ownership interests of up to 49% should be permitted if there is a single majority shareholder,[92] and that non-voting ownership interests should be treated as noncognizable, similar to the cable/broadcast cross-ownership rules.[93] Some argue that any ownership interest short of a 50% voting interest should be deemed non-cognizable.[94] PacTel asserts that no passive investment should be prohibited.[95] USTA objects to any numerical ownership limit.[96] US West states that it does not object to a 5% ownership limitation if there is no single majority shareholder; it proposes a 25% ownership limit if there is a single majority shareholder.[97] Several parties caution the Commission to construe the programming prohibition as narrowly as possible to avoid unnecessarily restricting local telephone companies' fundamental First Amendment rights.[98]

62. In reply to LEC requests for further relaxation of the ownership restrictions, several parties assert that LECs do not need additional incentives in the form of increased ownership interests to deploy a ubiquitous common carrier broadband network infrastructure.[99] They maintain that LEC concerns over program availability have been resolved by program access provisions which curtail the ability of cable operators to obtain exclusive rights to programming.[100]

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91 Ameritech Reply Comments at 3; US West Petition at 7-9; BellSouth Comments at 6-7.

92 PacTel Petition at 19-20; Bell Atlantic Petition at 2-4; US West Petition at 8-9; BellSouth Comments at 6; SNET Comments at 6.

93 Ameritech Reply Comments at 3; PacTel Petition at 20; Bell Atlantic Petition at 2-4; US West Petition at 8-9.

94 United Petition at 2-4; SWBT Petition at 7.

95 PacTel Petition at 19.

96 USTA Comments at 5-11.

97 US West Petition at 8-9.

98 Ameritech Comments at 5, Reply Comments at 8-9; USTA Comments at 4; SWBT Comments at 9, 15.

99 ACT Petition at 9-12; NAB Petition at 8; CFA/CME Comments at 8-9.

100 INTV Petition at 7-11; see also NAB Comments at 7; CFA/CME Comments at 8.

63. Some parties specifically oppose adoption of rules paralleling the cable/broadcast cross-ownership rules, asserting that these rules are designed primarily to promote diversity, not prevent discrimination.[101] They also argue that the cable/broadcast rules governing passive investments contemplated pure investors, such as investment companies, banks, and insurance companies, with no interest in controlling the companies in which they invested. They argue that these rules should not apply to LECs, since LECs have made it clear that they seek to control video programming.[102] Additionally, they argue that LECs could not possibly be passive investors in programmers because, as operators of the video dialtone network, they would necessarily engage in contact or communications with programmers.[103] Finally, they argue that more restrictive ownership rules are especially appropriate in light of the significant non-ownership affiliations that LECs may have with video programmers.[104]

Discussion

64. We affirm the ownership affiliation standard of up to 5%, as adopted in the Second Report and Order. We modify the Second Report and Order, however, by defining more clearly the application of the standard. As discussed more fully below, we hold that, consistent with the statutory prohibition on provision by LECs of video programming to subscribers in their telephone service areas, a LEC may not hold an ownership interest of 5% or greater in a video programmer that offers service in the LEC's telephone service area. For purposes of the video dialtone rules, we define a video programmer as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering" of the programming or the price, terms, or conditions on which the

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101 NCTA Comments at 5-6.

102 NAB Comments at 9-10.

103 NAB Comments at 10-11. NAB notes that, in the broadcast context, the Commission has held that in order to maintain its passive role, an entity must refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations. Id. (citing Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1013-14 (1984) recon. granted in part, 58 RR 2d 604 (1985), further recon., 1 FCC Rcd 802 (1986) (Attribution of Ownership).

104 NAB Comments at 11. See also CFA/CME Comments at 6-7.

programming is offered to subscribers. We first address our decision to affirm the ownership affiliation standard of up to 5%. We then discuss our clarification that the standard applies to LEC ownership interests in video programmers, not video programming.

65. In the Second Report and Order, we addressed and rejected assertions that Congress intended to codify the interpretive notes to Section 63.54 of our Rules and that we are thereby precluded from modifying those notes. We stated that, while Congress indicated in the legislative history of the 1984 Cable Act its intention to codify our preexisting cross-ownership rules, Congress did not intend to codify every aspect of our rules. In support of this assertion, we noted that Congress changed the language of our cross-ownership rules, specifically codifying some aspects of these rules, while overruling others. We also noted that Congress could have explicitly codified Notes 1 and 2 had it intended to, but did not. Finally, we noted that nowhere in the legislative history of the 1984 Cable Act did Congress specifically indicate its intent to codify the interpretive notes to our rules.[105]

66. The absence of any indication that Congress specifically intended to codify Notes 1 and 2 is particularly significant in light of the fact that, just prior to the adoption of the 1984 Cable Act, the Commission had raised the cognizable media multiple ownership attribution standard from 1% to 5%.[106] This action took place in a comprehensive rulemaking proceeding in which the Commission concluded that an ownership interest of up to 5% in a broadcast licensee or cable television system conferred insufficient ability to exert influence or control.[107] Given this action by the Commission, we believe that, had Congress intended to preclude us from similarly revising the telephone company-cable television cross-ownership provision, it would have made this clear. The fact that it did not do so underscores our conclusion that, while Congress intended to codify the policy underlying those rules, it did not intend to codify the specific rules themselves.

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105 See Second Report and Order, 7 FCC Rcd at 5815-19 paras. 66-72 (citing Report of the Committee on Energy and Commerce to accompany H.R. 4103, Cable Franchise Policy & Communications Act of 1984, H.R. Rep. No. 934, 98th Cong., 2d Sess. at 56-67 (1984)) (House Cable Report).

106 See Attribution of Ownership, supra note 103. In 1984 the Commission increased to 5% the ownership attribution standard governing ownership of broadcast stations, cable television, and newspaper entities. See id.; 47 C.F.R. §§ 73.3555 and 76.501 (1993) (hereinafter referred to as the mass media multiple ownership rules).

107 Attribution of Ownership, 97 FCC 2d at 1003-07, paras. 6-29.

No party has offered any new arguments or otherwise convinced us that our conclusion was incorrect.

67. We reject assertions that raising the ownership limit from 1% to 5% will increase the likelihood of discrimination by LECs or is not in the public interest absent imposition of reporting requirements. As noted above, an ownership interest of up to 5% is recognized in other areas of the Commission's ownership rules as being a noncognizable interest. As such, we find that an ownership interest of up to 5% will not materially increase incentives for LECs improperly to favor some video programmers over others. To the extent a LEC attempts any discrimination, such actions would likely be brought to our attention, either in the Section 214 process, tariff review process, or through the Section 208 complaint process. In the event of a complaint alleging discrimination against a particular programmer, any violations of our ownership rules would likely be revealed through the discovery process. We also note that the largest LECs are subject to additional safeguards designed to prevent discrimination. Under the circumstances, we reject as speculative assertions that our ownership rules are likely to lead to significant undetectable discrimination by LECs.

68. We also reject requests that we permit all ownership limits up to 49%. As an initial matter, we reject assertions that we are required under the 1984 Cable Act to increase the noncognizable ownership level above 5%. As stated above, in enacting the cross-ownership provisions of the 1984 Cable Act, Congress intended to codify Commission policy underlying its then-extant rules in this area, which at the time permitted only 1% ownership interests. If Congress had wanted to require us to change our cross-ownership limit from 1% to 49%, as argued by some LECs, we believe it would have so indicated. We also reject arguments that we should exercise our discretion to raise the ownership limit above 5%. The Commission has previously found that few, if any, of the publicly held corporations that it regulates as broadcast licensees have more than one or two shareholders owning more than a 5% equity interest. We concluded that the great majority of shareholders holding a 5% or greater interest in such entities are the "preeminent shareholders in their respective companies, with enough votes potentially to affect the outcome of elective or discretionary decisions and to command the attention of management."[108] We concluded, further, that a greater level of ownership could confer a "substantial and influential interest."[109] Moreover, the Commission has long recognized that minority

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108 Id. at 1005-06, para. 14.

109 Id. at para. 15.

ownership interests can confer de facto control.[110] Under the circumstances, we do not believe that we should raise the ownership threshold above 5% at this time.[111]

69. We also decline suggestions that we adopt ownership attribution standards identical to the mass media multiple ownership standards. The mass media multiple ownership rules are intended primarily to ensure diversity of information sources to the American public.[112] Our video dialtone construct has additional purposes, including not only promoting diversity of video programming sources, but also reducing the likelihood of discrimination by LECs in their provision of video dialtone service. Thus, for example, while a nonvoting ownership interest, which confers no power to control or influence decision making, may not implicate the purposes of the mass media multiple ownership rules, that same interest may raise concern about incentives for discrimination. The same could be true for a 49% interest in an entity with a single majority shareholder. In light of these different goals, we decline to apply all aspects of the mass media multiple ownership rules to video dialtone.[113] We do, however, modify the Second Report and Order by clarifying that the provisions of our mass media multiple ownership standards relating to vertical ownership chains, not involving investment companies, do apply in the video dialtone context.[114] While the Second Report and Order did not specifically address this issue, these rules are essential to ensure that LECs cannot avoid ownership limitations by using intervening corporate entities.

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110 See Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Com. L.J. 277, 296-98 (1991). See generally Intermountain Microwave, 24 R.R. 983 (1963).

111 See In the Matter of the Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 3359 (1993) (Competition and Diversity Order) (relying on video dialtone attribution standard and adopting 5% ownership standard in vertical integration rules for cable operators and programming vendors).

112 Attribution of Ownership, 97 FCC 2d at 1004, para. 11.

113 See Competition and Diversity Order, 8 FCC Rcd at 3370-71, para. 32 (declining, for similar reasons, to exempt passive ownership interests or to adopt single majority shareholder rule as part of vertical integration rules for cable operators).

114 See 47 C.F.R. § 76.501 note 2(d) (1993).

70. We are not persuaded by LEC arguments that, if the ownership limits are not increased, LECs will lack incentives to invest in video dialtone or to provide financing to independent video programmers. As an initial matter, we are unconvinced by assertions that our ownership restrictions will deny LECs needed sources of video programming. As discussed below, LECs are permitted to own video programming, and they may finance the development of programming that others distribute on the LECs' video dialtone systems.[115] In addition, as noted by some parties, the program access provision in the 1992 Cable Act and the Commission's implementing rules should further ensure access to sufficient programming for distribution on the video dialtone system. Moreover, LECs are free to engage in a number of video-related activities. Thus, our rules permit LECs to offer common carrier video delivery services and a host of enhanced and other nonregulated services. They also permit LECs to own up to a 5% interest in a video programmer and to enter into a wide range of non-ownership affiliations with video programmers other than cable operators. These avenues should provide LECs with more than sufficient incentives to deploy video dialtone networks.

71. We also reject LEC arguments that we should construe the cross-ownership ban more narrowly in light of potential First Amendment issues. Several LECs have challenged the constitutionality of this ban in court.[116] To the extent these challenges are successful, we will replace our cross-ownership rules with appropriate alternative regulatory measures. At this point in time, however, we believe that our rules are narrowly tailored to serve legitimate Congressional goals.

72. While we thus retain our current ownership restrictions, we anticipate that some relaxation of the rules may be warranted in the future. In particular, we anticipate further relaxation of the ownership limits when the capacity of LEC video dialtone systems can be readily expanded through, for example, digital transmission technology. We believe that, as technical and economic constraints on the expandability of video dialtone system capacity diminish, any ability of LECs to discriminate against nonaffiliated programmers will likewise be reduced. At such point, we believe it would be consistent with the policies underlying our current cross-ownership rules and with Congressional intent for us to consider reexamining these ownership restrictions.

73. Finally, in the Second Report and Order, there appear to be some ambiguities regarding the types of affiliations to which

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115 See infra paras. 73-74 and 87-102.

116 See supra note 24.

the attribution standard is intended to apply.[117] We therefore take this opportunity to resolve these ambiguities. The 1984 Cable Act by its terms does not prohibit LECs from owning video programming. Rather, it prohibits any common carrier from providing "video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier."[118] We believe that the statutory references to the provision of video programming, rather than the ownership of video programming, are deliberate. At the time of enactment of the 1984 Cable Act, there was considerably less vertical integration in the cable television industry than there is now,[119] and the BOCs, which served the large majority of the country's access lines, were not permitted under the terms of the AT&T divestiture to offer information services within their service areas.[120] Congress thus had little reason to be concerned about the ownership of video programming by cable operators or LECs. It was concerned, however, that the pervasive reach of the telephone companies, combined with their market power, could endanger the cable industry and potentially eliminate a valuable information source for the American public.[121] For these reasons, Congress prohibited telephone companies from competing with cable operators in the provision of video programming in the LECs' local service areas.

74. Consistent with the cross-ownership provisions of the 1984 Cable Act, we clarify that our cross-ownership rules do not prohibit LECs from owning video programming, even programming that another, independent programmer (i.e., a programmer neither owned nor controlled by the LEC) provides over the LEC's video dialtone system. Nor is any LEC prohibited from owning entities that

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117 For example, in paragraph 36, the Second Report and Order permits up to 5% ownership of "video programmers" by telephone companies. In paragraph 14, however, it discusses cognizable financial interests in "video programming." Compare 7 FCC Rcd at 5801, para. 36 with 7 FCC Rcd at 5789, para. 14.

118 47 USC § 533(b)(1).

119 See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5007-08, para. 90 (1990).

120 Restrictions on BOC provision of information services were lifted in 1991. United States v Western Elec. Co., Inc., 767 F.Supp. 308 (D.D.C. 1991), aff'd, 993 F.2d 1572 (D.C. Cir. 1993), cert. den., Consumer Federation of America v. United States, 114 S.Ct. 437 (1993).

121 See House Cable Report, supra note 105.

provide video programming outside its service area. LECs may not, however, provide or distribute any video programming directly to subscribers in their telephone service area. Further, LECs may not hold a cognizable ownership interest, as defined above, in any entity that provides video programming directly to subscribers in their telephone service area. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers by making decisions concerning the bundling or "tiering" of the video programming, or the price, terms, or conditions on which the video programming is offered to subscribers.

b. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

Background

75. Prior to adoption of the Second Report and Order, telephone companies were strictly limited to the carrier-user relationship in the provision of any type of service or activity related to video programming.[122] In the Second Report and Order, the Commission concluded that LECs could exceed the carrier-user relationship with video programmers in certain circumstances without violating the statutory prohibition against telephone company provision of video programming directly to subscribers in the LECs' telephone service area. The Commission also concluded that the public interest would be served if it permitted LECs this additional freedom.

76. Specifically, the Commission held that LECs should be permitted to exceed the carrier-user relationship with video programmers that are customers of, interconnect with, or share the construction and/or operation of the basic video dialtone platform. LEC provision of nonregulated services related to video programming, such as video gateways, was made contingent upon their provision of a common carrier video dialtone platform with sufficient capacity to serve multiple video programmers.[123]

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122 Under our rules, the carrier-user restriction limited telephone companies to the provision of common carrier services underlying video distribution, specifically precluding telephone companies from providing video programming and video-related enhanced services, such as video processing functions and video gateways, or entering into other non-tariffed relationships with a provider of video programming within their telephone service areas.

123 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

77. Among the non-ownership relationships specifically enumerated were: the offering of enhanced services related to video programming; joint ventures to share costs and construction and operation of facilities; interconnection arrangements; debtor-creditor relationships; consultant-client relationships; and other relationships that do not constitute ownership or control.[124] To assure compliance with the statutory cross-ownership restriction, the Commission held that determining how video programming is presented for sale to consumers, including making decisions concerning the bundling or tiering, or the price, terms and conditions of video programming offered to consumers, or otherwise holding a cognizable financial interest in, or exercising editorial control over, video programming provided directly to subscribers within a LEC's telephone service area were still prohibited activities.[125]

Pleadings

78. Several petitioners assert that the Commission erred in permitting LECs to exceed the carrier-user relationship with video programmers. They assert that the permitted non-ownership relationships could foster anti-competitive conduct by LECs, cable companies, and video programmers.[126]

79. CFA/CME assert that permitting LECs and cable companies to share construction and operation of the video dialtone system will reduce facilities-based competition because: (1) cable companies investing in video dialtone systems would likely abandon their cable systems in favor of the video dialtone system, thereby creating a new monopoly; (2) video dialtone systems would likely be designed so as not to duplicate or compete with existing cable features, but rather complement them; (3) joint ventures facilitate collusion, because venturers often agree, expressly or implicitly, not to compete directly with each other.[127] CFA/CME argues that the Commission offered no sufficient explanation of the need for joint ventures and no hard evidence that joint ventures are a necessary incentive for LEC participation in video dialtone.

80. CFA/CME assert, further, that allowing LECs to offer enhanced services and to enter into joint ventures with video

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124 Id. at 5798, para. 31.

125 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

126 CFA/CME Petition at 2-11; NAB Comments at 6; ACT Petition at 11; NCTA Petition at 16.

127 CFA/CME Petition at 3-8. See also NCTA Petition at 16, Reply Comments at 1-2.

programmers gives the LEC a financial stake in the success of such programmers, thereby creating incentives for LECs to discriminate against other programmers. It argues that discrimination against unaffiliated video programmers could manifest itself in a number of subtle ways, including: better service, faster implementation of programming, sharing of marketing information, and favorable pricing to affiliated video programmers. In addition, CFA/CME argue LECs might design their systems to favor certain programmers and provide such programmers with "insider" information about the capabilities and limitations of video dialtone systems, as well as advance knowledge of new network features.[128]

81. NCTA asserts that the carrier-user restriction was codified in the 1984 Cable Act and that the Commission exceeded its authority in altering the restriction.[129] Several petitioners argue that permitting joint ventures and financing contravenes the cross-ownership restriction by increasing the ability of LECs to exert influence over the video programmer to the point of control.[130] NCTA asserts that permitting telephone companies to offer enhanced gateway services is tantamount to permitting the provision of programming, contrary to the statutory restriction.[131]

82. Two petitioners assert it will be virtually impossible for the Commission to ensure that telephone companies do not control video programmers.[132] NAB asserts that the Commission has no means of gathering information from LECs regarding their interests in and agreements with video programmers. CFA/CME argue that the Commission's non-ownership restrictions are too ambiguous to be effective.

83. LECs support the easing of non-ownership restrictions, asserting that joint ventures and other non-ownership affiliations will promote deployment of video dialtone, increase diversity of services, and improve the ability of programmers to reach

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128 CFA/CME Petition at 9-11. See also NAB Comments at 6.

129 NCTA Reply Comments at 3-5.

130 NAB Petition at 5, Comments at 5-6; ACT Petition at 11-12; NCTA Petition at 14-15, Reply Comments at 3-5.

131 NCTA Reply Comments at 3-5. For example, NCTA contends that selecting video programmers' participation in a gateway, determining availability of access to a gateway, encouraging participation in a gateway, and retailing gateway packages constitute the selection and provision of video programming.

132 NAB Petition at 6; CFA/CME Petition at 11-12.

consumers.[133] They also support the Commission's conclusion that these rule changes are consistent with the 1984 Cable Act.[134] They oppose, however, the Commission's decision to require LECs to establish a basic video dialtone platform before offering video-related enhanced services. They also oppose limiting both non-ownership relationships and offerings of enhanced services to programmers that have a nexus to the platform. Noting that the Commission acknowledged these restrictions are not required by the 1984 Cable Act, they assert the Commission did not provide any logical basis for imposing them.[135]

84. LECs contend that the conditions on non-ownership relationships unnecessarily restrict the ability of LECs to develop and offer enhanced services.[136] SWBT argues that since LECs will be new entrants in the video services market, competing against a monopoly incumbent provider, the Commission should impose no limitations beyond those mandated by the 1984 Cable Act.[137] Several LECs argue that the Commission's new policy is anticompetitive -- essentially a mandated tying arrangement -- and that it is anomalous for the Commission to require "bundling" of video services when it requires unbundling in so many other areas.[138] Ameritech suggests that the Commission could achieve its goal of encouraging LEC deployment of video dialtone systems, without limiting LEC provision of enhanced services to users of the basic platform, simply by requiring LECs to make available a basic platform before providing such services.[139]

85. US West argues that requiring LECs to build a basic platform before entering into relationships that exceed the carrier-user relationship will impede development of video dialtone

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133 Ameritech Comments at 7-8; Bell Atlantic Reply Comments at 2-3.

134 Bell Atlantic Comments at 2-3; NYNEX Comments at 6-7; US West Petition at 2-3.

135 Ameritech Petition at 4-5; SWBT Petition at 10-11; NYNEX Petition at 6-7; BellSouth Comments at 14; SNET Comments at 6-8; US West Petition at 2-5; Bell Atlantic Comments at 2-3.

136 Ameritech Petition at 3-6; NYNEX Petition at 7; SWBT Petition at 11; SNET Comments at 6-8.

137 SWBT Petition at 3-5, 10-11.

138 NYNEX Petition at 7; Ameritech Petition at 5; SNET Comments at 7.

139 Ameritech Petition at 5.

systems. US West argues that LECs will be reluctant to build video dialtone systems unless they can share the risks of such systems with video programmers.[140] US West also argues that the Commission's actions represent a re-regulation of enhanced services without proper notice and comment.[141] Bell Atlantic asks us to clarify that LECs remain free to provide services "unrelated to the provision of video programming," such as billing and collection, inside wire installation and maintenance, customer premises equipment sale and maintenance, and other enhanced services, to unaffiliated video programmers.[142] Likewise, GTE seeks clarification of the reach of the carrier-user restriction remaining in the Commission's rules.[143]

86. In response to the LEC petitions, other petitioners assert that the Commission properly imposed the limitations to ensure that LECs do not simply use their new non-ownership affiliation rights to provide enhanced services over existing facilities and fail to construct the broadband common carrier platform.[144] Prodigy and IIA dispute US West's assertion that the Commission's requirements constitute a re-regulation of enhanced services.[145] Prodigy argues that these requirements are, rather, analogous to the comparably efficient interconnection requirements of the Computer III safeguard regime.

Discussion

87. We affirm our decision to permit LECs to enter into non-ownership relationships that exceed a carrier-user relationship with video programmers, but modify our rules in this area in several respects. As modified, our rules impose tighter restrictions on LEC relationships with franchised cable operators than with other video programmers. We allow LECs, under certain circumstances, to provide enhanced or other nonregulated services related to the provision of video programming to cable operators, in their telephone service areas. These services might, for example, include video gateway or billing and collection services.

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140 US West Petition at 4-5. The Second Report and Order specifically permits LECs to engage in joint ventures with video programmers who share construction and/or operation of the basic platform. See 47 C.F.R. § 63.54(d)(2) (1993).

141 Id.

142 Bell Atlantic Petition at 4-5. See also SWBT Petition at 11.

143 GTE Petition at 8-12.

144 NAB Comments at 12; see also OC/UCC Petition at 2.

145 Prodigy Comments at 3; IIA Comments at 2.

We also allow LECs to lease cable drop wires from cable operators, subject to certain conditions.[146] We do not otherwise generally allow a LEC to exceed the carrier-user relationship with cable operators in the LEC's telephone service area. On the other hand, we permit LECs, subject to certain conditions, to enter into a broad range of non-ownership relationships with video programmers who are not franchised cable operators, provided those relationships do not involve such programmers in the operation of the basic video dialtone platform.[147] Those relationships might include, for example, providing enhanced and other nonregulated services, as well as entering into joint ventures, debtor-creditor, and other relationships that do not confer ownership or control.

88. We relax the non-ownership rules established in the Second Report and Order in two respects: First, we permit LECs to offer enhanced and other nonregulated services related to video programming to any video programmer, in areas substantially served by a video dialtone platform, without regard to whether the video programmer purchasing such services has a nexus to that platform. An area shall be considered substantially served by a video dialtone platform if video dialtone service is available to a significant majority -- i.e., 70% -- of the households in that area.[148] Second, we permit LECs to enter into other types of non-ownership relationships with video programmers who are not franchised cable operators, without regard to the existence of a video dialtone platform.

89. We also tighten the non-ownership rules in two respects. First, we generally prohibit LECs from exceeding the carrier-user

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146 See supra paras. 54-55. In addition, LECs may continue to offer channel service to any franchised cable operator or other video programmer, since channel service is consistent with a carrier-user relationship.

147 As noted above, four courts have ruled the 1984 Cable Act ban on telephone company provision of video programming unconstitutional. See supra para. 15 and note 24. This Order does not address the regulatory framework that applies to LECs that provide video programming directly to subscribers.

148 Thus, for example, a LEC would be able to offer enhanced and other nonregulated services related to the provision of video programming to a cable operator if video dialtone were available to 70% of the households in that cable operator's service area. The LEC would continue to be able to provide such services in connection with the provision of video programming over the video dialtone system itself, as permitted under the Second Report & Order, because the basic video platform would be available to all the households for which the video programmer seeks such services.

relationship in their telephone service area with franchised cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in areas substantially served by a video dialtone platform,[149] or to lease cable drop wires.[150] Second, we generally prohibit affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

90. We relax our non-ownership rules as described above because those rules as originally structured appear to be more restrictive than necessary to achieve our objectives. In the Second Report and Order, we permitted LECs to exceed the carrier-user relationship with a video programmer, but only if that programmer was a customer of, interconnected with, or shared the construction or operation of the basic video dialtone platform.[151] In requiring this connection, we explained that we believed it necessary "to assure that, in exceeding the current carrier-user relationship, telephone companies will both provide the basic platform to video programmers and use it as the basis for their own participation in the video marketplace."[152] We were concerned that, absent this link, telephone companies might forego investing in video dialtone, limiting themselves instead to providing services on existing cable facilities.

91. We now conclude that our goal of encouraging LECs to build and use basic video dialtone platforms can be achieved without requiring that purchasers of LEC enhanced or other nonregulated services related to the provision of video programming maintain a nexus to those platforms. So long as a LEC has built a basic platform that satisfies our video dialtone requirements, and that is available in a particular video programmer's service area, there is no public interest justification for prohibiting the LEC from offering enhanced or other nonregulated services to that video programmer, even if the programmer has no nexus to the platform. Indeed, permitting that video programmer to purchase

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149 As noted above, we propose in the Third Further Notice to modify our prohibition on LEC acquisition of cable facilities by permitting such acquisitions in certain areas. We also propose in that notice to permit LECs and cable operators jointly to construct video dialtone systems in such areas. See infra Third Further Notice, paras. 276-279.

150 For discussion of our reasons for permitting LECs to lease drop wires from a cable operator in their service areas, see supra paras. 54-55.

151 Second Report and Order, 7 FCC Rcd at 5789, para. 14.

152 Id. at 5798-99, para. 31.

such services from the LEC expands the range of potential customers of LEC enhanced and nonregulated services, thereby increasing LEC incentives to build video dialtone systems. At the same time, permitting LECs to provide services to video programmers who have no nexus to a video dialtone platform, including cable operators, benefits video programmers by enabling them to take advantage of such services, even if they choose not to use video dialtone as their transmission medium.

92. We recognize that a video programmer's service area often will not coincide precisely with the area served by a video dialtone platform. For example, a cable operator's franchise service area that substantially overlaps a video dialtone service area may include households outside the video dialtone service area. In that situation, so long as the LEC has made video dialtone available to a significant majority of the households in the area in which the cable company seeks enhanced or other nonregulated services from the LEC, there would be no reason to prohibit the LEC from providing enhanced or other nonregulated services to that cable operator. We therefore hold that LECs may provide enhanced and other nonregulated services within their telephone service area to a video programmer if video dialtone is available to a significant majority of the households in the area in which the video programmer seeks such services. We also hold that, for purposes of applying this rule, 70% of the households in the area in which a video programmer seeks enhanced or other nonregulated services would constitute a "significant majority." We acknowledge that this seventy percent standard is not the only standard that we could have adopted. We believe, however, that this standard is reasonable because it does require that video dialtone be available to a significant majority of households within the area in which the video programmer seeks to take LEC nonregulated services and thus provides LECs with the necessary incentives to deploy video dialtone.

93. We also permit LECs to enter into certain other non-ownership relationships (e.g., joint ventures and debt financing) within their service area with video programmers who are not cable operators, without regard to the existence of a video dialtone platform. Eliminating the requirement that LECs build a video dialtone platform before establishing these other relationships will not compromise our goal of encouraging video dialtone deployment. The revenues offered by a video dialtone system, including the ability of LECs to provide enhanced and other nonregulated services in areas substantially served by video dialtone, should provide ample incentives for LECs to construct video dialtone platforms. Indeed, it is not clear that the rule adopted in the Second Report and Order would further the goal of ensuring widespread deployment of video dialtone systems. Under that rule, it could be argued that a LEC could enter into a non-ownership relationship with any video programmer who had a nexus to a single video dialtone platform of that LEC. Thus, for example,

a LEC could provide debt financing to a national video programmer if that programmer offered one program on one video dialtone platform operated by that LEC. We do not believe that this required nexus has a sufficiently compelling relationship to our goals to retain it.

94. While a stricter interpretation of the non-ownership relationships rule adopted in the Second Report and Order would be possible, we do not believe that such an interpretation would serve the public interest. For example, prohibiting LECs from affiliating with video programmers who offer programming via cable or other transmission systems in the LEC region in areas not served by a video dialtone platform could make it impracticable in the near future for many small, independent programmers to obtain debt financing from a LEC, since the price of such financing would be a much more limited market for their product. Likewise, it could effectively deny LECs the ability to provide financing to programmers in order to stimulate usage of video dialtone systems.

95. While we thus liberalize our non-ownership relationship rules in certain respects, we also narrow these rules in other respects. First, we generally prohibit LECs from exceeding the carrier-user relationship in their telephone service area with any franchised cable operator, except (as described above) to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires. One of the primary goals of this proceeding is to lay the groundwork for the development of competition in wire-based video delivery services.[153] We believe that allowing a broad range of affiliations between LECs and cable operators in a LEC's telephone service area could undermine this goal. For example, permitting LECs and cable operators to construct or operate jointly a video dialtone platform could encourage cable operators to abandon their facilities in favor of the video dialtone platform. Indeed, we consider it highly unlikely that a cable operator would participate in the construction or operation of a video dialtone system unless it planned to use or was using that platform. In that event, the public would lose the benefit of competition provided by the cable system. Conversely, LECs might be inclined to underwrite a cable operator instead of building competing video distribution systems. Moreover, even in markets in which LECs build video dialtone systems, incentives to compete vigorously could be tempered by debt financing, joint ventures, and other non-ownership relationships with the cable operator. We are particularly concerned about that possibility given that, in the near-term, the LEC and cable

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153 It is largely for this reason that we generally prohibit LECs from acquiring cable facilities in their service area for use in provision of video dialtone. See supra paras. 48-55.

operator are likely to be the only two wired-based video systems in most markets. Under the circumstances, the risks of anticompetitive consequences outweigh any public gain that could be offered by permitting such relationships.

96. Second, we generally prohibit cable operators or any other video programmers from participating in the operation of a basic video dialtone platform. Unlike LECs, which are subject to Title II of the Communications Act, and, in the case of the largest LECs, nonstructural safeguards designed to prevent or reveal discrimination, video programmers are subject to no Title II nondiscrimination obligations or requirements.[154] We therefore conclude that, without special safeguards, permitting video programmers wide latitude in participating in the operation of the basic video dialtone platform raises too great a risk of discrimination. Nevertheless, we may permit discrete roles for video programmers in operating the video dialtone platform if we conclude that the benefits of permitting such roles outweigh any risk of discrimination that they raise. For example, in the Third Further Notice, we seek comment on the operation of shared channel mechanisms, including the possibility of allowing video programmers to play some role in the operation of such mechanisms.[155] While we do not now prejudge the issues raised in that Notice, we wish to clarify that our general policy of prohibiting video programmers from participating in the operation of the video dialtone platform would not necessarily preclude such shared channel mechanisms.

97. These modifications aside, we otherwise affirm our rules governing non-ownership affiliations. We also affirm that we are not statutorily precluded from allowing LECs to exceed the carrier-user relationship in providing video dialtone service. As we stated in the Second Report and Order, the 1984 Cable Act did not codify the Commission's then-extant interpretive notes to the telephone company-cable cross-ownership rules limiting LECs to a strict common carrier-user relationship. Rather, Congress adopted the basic underlying policy of the cross-ownership rules without codifying the precise rules themselves.[156] The cross-ownership rules were intended to foreclose telephone companies from participating in the video marketplace as traditional cable operators, which select or provide the video programming available to subscribers

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154 Even though LECs could be liable for violations of the Communications Act by a video programmer with which it operated the video dialtone platform, we are concerned that the LEC in some instances might not be able to prevent discrimination by a video programmer which is not itself subject to Title II of the Act.

155 See infra Third Further Notice, paras. 268-275.

156 Second Report and Order, 7 FCC Rcd at 5815, para. 66.

over a cable system.[157] We are thus not precluded from allowing LECs an expanded role in the video marketplace, provided that LECs do not assume the role of traditional cable operators.[158] No party has offered any new argument or otherwise convinced us that our earlier decision was incorrect. Nor are we persuaded that our rules governing LEC provision of enhanced services to video programmers constitute a re-regulation of such services without proper notice. Contrary to US West's assertion, our video dialtone rules give LECs greater freedom with respect to video-related enhanced services, because prior to video dialtone, LECs were prohibited from offering these services at all in their telephone service area.

98. We reject assertions that allowing non-ownership relationships effectively permits LECs to engage in the provision of video programming directly to subscribers in their service areas. Our rules expressly prohibit LECs -- directly or indirectly or through an ownership or non-ownership affiliation relationship -- from determining, inter alia, how video programming is presented for sale to consumers. They may not make decisions concerning the bundling or tiering of video programming or the price, terms or conditions of the offer of video programming to subscribers. While some argue that providing video gateways will necessarily involve LECs in such prohibited activities, we do not believe this to be the case. LEC-provided video gateways may facilitate access by subscribers to certain video programming, but subscribers to the gateway would remain free to pick and choose any programming on or off the gateway. Thus, no prohibited bundling would be involved. Moreover, each video programmer on the gateway would set the price, terms and conditions under which its programming would be available to subscribers, including the tiering of such programming. LECs offering gateways would be permitted no role in this process. Therefore, we do not believe that permitting non-ownership affiliations will enable LECs to provide video programming directly to subscribers in their service areas.[159] Moreover, in authorizing LECs to enter into certain non-ownership relationships with video

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157 Id. at 5816-17, paras. 66-69. See also NCTA v. FCC, No. 91-1649, slip op. at 18 (D.C. Cir. August 26, 1994) ("cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include,'" citing FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979)).

158 Id.

159 See discussion regarding ownership affiliations, supra paras. 64-74; NCTA v. FCC, No. 91-1649, slip op. at 12-13 (D.C. Cir. August 26, 1994) ("That a telephone company may provide unregulated enhanced services under its video dialtone authorization does not mean that it will engage in the 'transmission of video programming' as contemplated by the Act").

programmers, we find that these relationships would not normally confer ownership or control. If, however, in a particular situation, a LEC's non-ownership relationships confer de facto ownership or control of a video programmer, we will treat those relationships as cognizable interests for purposes of our cross-ownership rules.[160]

99. We also reject assertions that permitting non-ownership affiliations will substantially increase LEC incentives and ability to discriminate in favor of affiliated programmers or against nonaffiliated programmers. Because the video dialtone platform must be provided on a common carrier basis, LECs are prohibited by Section 202 of the Act from engaging in unreasonable discrimination in their provision of video dialtone service. They are also required to tariff their basic video dialtone offerings and submit to the Section 208 complaint process if a video programmer files a complaint alleging discrimination. In addition, we have in place nonstructural safeguards and cost allocation rules designed to prevent discrimination and cross-subsidization.[161] These rules, which were developed to ensure that the BOCs and GTE do not discriminate or cross-subsidize in favor of their own enhanced service operations, should also ensure that these LECs cannot favor particular classes of video programmers over others. Given these requirements and safeguards, we do not find that a non-ownership relationship, which entails no equity interest, creates sufficient risk of undetectable discrimination as to warrant restricting LECs to carrier-user relationships with video programmers. To the contrary, LECs are permitted to enter into many such relationships in the non-video context, and we have seen no evidence that these relationships have resulted in unlawful discrimination.[162]

100. Moreover, parties seeking to restrict LECs to a carrier-user relationship with video programmers ignore the costs associated with excessive restrictions. For example, prohibiting LECs from providing enhanced or other nonregulated services denies subscribers and programmers the benefits of those services. Similarly, prohibiting LECs from providing financing to independent video programmers could deny such programmers a needed source of capital. Therefore, we conclude that any risk of anticompetitive consequences is outweighed by the benefits that could derive from

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160 See Intermountain Microwave, supra note 110.

161 See infra sections IV.B.2 - IV.B.4.

162 For example, the fact that LECs are permitted to provide billing and collection services to interexchange carriers has not to our knowledge resulted in discrimination by LECs against carriers that choose not to use LEC billing services or in favor of those that do.

the non-ownership affiliations we now permit. Nevertheless, we will remain vigilant in ensuring that LECs do not engage in improper discrimination or cross-subsidization.

101. To summarize, LECs may provide enhanced or other nonregulated services related to the provision of video programming to any video programmer, including a cable operator, in areas substantially served by a video dialtone platform. LECs may also enter into other types of non-ownership relationships with video programmers that are not franchised cable operators, except that they generally may not jointly operate the video dialtone platform. LECs may not, however, otherwise exceed the carrier-user relationship in their telephone service area with franchised cable operators, except to lease cable drop wires. We believe that these modifications of the non-ownership affiliation rules make them more consistent with our overall video dialtone policies.

102. We note that LECs remain unrestricted in the provision of enhanced or other nonregulated services unrelated to the provision of video programming, whether within or outside the LEC service area.[163] LECs also remain unrestricted in the provision of video programming directly to subscribers outside their service area. Finally, for purposes of our non-ownership affiliation rules, we will treat debt that is convertible to stock as non-cognizable unless the interest is converted, or, based on an analysis of the specific facts involved, we conclude that the interest confers control over a video programmer. This is consistent with our treatment of convertible debt in other areas.[164] Moreover, to the extent the equity interest would be impermissible, LECs would be unable lawfully to convert the debt. Therefore, it is proper to view it as debt, rather than equity, unless and until any such conversion occurs.

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163 Second Report and Order, 7 FCC Rcd at 5797, para. 30 n.70; 47 C.F.R. § 63.54(d)(2) (1993).

164 See, e.g., Attribution of Ownership, 97 FCC 2d at 1020-23, paras. 45-52; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN. Docket No. 90-314 and ET Docket No. 92-100, FCC 94-144, 59 Fed. Reg. 32830 (June 24, 1994). We recognize that convertible debt is treated differently in our Personal Communication Services auction rules. Those rules differ because of our desire to ensure that small businesses and those owned by women and minorities have sufficient financing options available to them. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-178 (July 15, 1994). See also Signal Ministries, Inc., 104 FCC 2d 1481, 1490-91, para. 11 (Rev. Bd. 1986); National Broadcasting Company, Inc., 6 FCC Rcd 4882, 4882-83 (1991).

c. Definition of Video Programming

Background

103. The 1984 Cable Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[165] In the Second Report and Order, the Commission concluded that Congress intended to prohibit only telephone company provision of programming comparable to that provided by broadcast television in 1984.[166] The Commission stated that while it is not possible to classify with precision all potential services to be offered over the video dialtone platform, "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming' for purposes of the statutory prohibition."[167] The Commission added that video services involving complex viewer interaction generally fall outside the scope of video programming, although the Commission stressed that elements of an interactive video service may be deemed video programming if those elements can readily be separated and provided as independent programming comparable to that carried in 1984.[168]

Pleadings

104. No party disputes the Commission's holding that Congress intended to include within "video programming" only that which is comparable to programming provided by television broadcasters in 1984. Three LECs, however, argue that the Commission's interpretation of the types of services that meet this definition is overbroad and inconsistent with the terms and legislative history of the 1984 Cable Act.[169]

105. NYNEX argues that the term video programming should encompass only "continuously playing programming that is generally available to a mass audience of viewers who use their television screens to view material." NYNEX maintains that the term should

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165 47 U.S.C. § 522(16).

166 Second Report and Order, 7 FCC Rcd at 5820-21, para. 74.

167 Id.

168 Id. at 5821, para. 75.

169 See Ameritech Petition at 8-11; BellSouth Petition at 1-8; NYNEX Petition at 9-11. See also Ameritech Reply Comments at 2; USTA Comments at 12-13.

not include video-on-demand services, which permit viewers to select programs and the time to view them.[170] Ameritech suggests an even narrower definition that would limit video programming to services that were actually provided by broadcast companies in 1984.[171]

106. Both NYNEX and Ameritech criticize the severability concept. NYNEX argues that the concept only adds confusion to the definition.[172] Ameritech asserts that the attempt to separate content from the end product has no basis in the 1984 Cable Act. Ameritech also argues that the narrowest possible construction of the term video programming is necessary to provide consumers with meaningful video programming options and to avoid violating LEC First Amendment rights.[173]

107. BellSouth confines its comment to video-on-demand services.[174] It argues that a video-on-demand subscriber's ability to manipulate and control the video images is so intertwined with the delivery of those images that there is no effective way to sever the interactive functionality from program content.[175] It argues, further, that because a video-on-demand subscriber selects the video images delivered, this service more closely resembles two-way information gateway services than traditional one-way broadcasting.[176] It therefore asks that we reconsider the

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170 NYNEX Petition at 10-11.

171 Ameritech Petition at 8-11. Thus, whereas NYNEX would include pay-per-view services within the definition of video programming, Ameritech would not and argues that it was Congress' intention to treat them differently. Id.

172 NYNEX Petition at 9-11.

173 Ameritech Petition at 8-11.

174 BellSouth Petition at 1-8.

175 Id. BellSouth purports to distinguish video-on-demand services from pay-per-view services on the ground that pay-per-view subscribers cannot dictate when video images are broadcast or the precise manner or order in which those images are displayed. Id. at 5-7. BellSouth argues that even if subscribers may choose their desired camera angle for a pay-per-view service, all subscribers choosing the same camera angle option will see the same video images at the same time. According to BellSouth, the camera angle option is thus a severable interactive functionality. Id.

176 Id. at 1-8.

Commission's finding that video-on-demand content falls within the definition of video programming.

108. Several parties oppose LEC requests for a revised interpretation of the definition of video programming.[177] CFA/CME and NAB maintain that the Commission's severability analysis is consistent with Congressional intent and supported by the legislative history of the 1984 Cable Act.[178] NCTA, NECTA, and CLG argue that subscriber interaction, such as the ability to fast-forward or rewind a program or choose the time in which to view it, does not transform the underlying nature of that program. NCTA argues that to hold otherwise "would open a gaping loophole in the cable-telco cross-ownership ban, exploitable by telephone companies who claim to have added a few nebulous 'interactive functions' to the delivery of what is otherwise conventional video programming."[179]

Discussion

109. We affirm our interpretation of the statutory definition of video programming set forth in the Second Report and Order. We believe that the Commission's interpretation most closely comports with Congressional intent in enacting the 1984 Cable Act.[180] We also affirm the Commission's conclusion that video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.

110. In reaching this conclusion, we specifically reject LEC arguments that the severability test is inconsistent with the 1984 Cable Act. We addressed this issue in the Second Report and Order,

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177 CFA/CME Comments at 21-24; NAB Comments at 3-4; CLG Comments at 6-8; NCTA Comments at 9-10; and NECTA Comments at 4-5.

178 CFA/CME Comments at 22-23; NAB Comments at 4. CFA/CME maintains that the legislative history of the 1984 Cable Act makes clear that the addition of an interactive component does not automatically transform a video program into a non-video program. CFA/CME Comments at 24. Similarly, NAB argues that the LEC suggestion that video programming be defined with reference to the mode of delivery, as opposed to the content of the underlying image, "goes far beyond Congressional intent." NAB Comments at 4. CFA/CME also asserts that Ameritech's request that video programming be limited to programming provided in 1984 ignores that the statutory definition also includes programming "comparable" to that provided by broadcasters in 1984. CFA/CME Comments at 23-24.

179 NCTA Comments at 10.

180 Second Report and Order, 7 FCC Rcd at 5821, para. 75.

concluding that the severability test most fully reflects the intent of the statute. We stated that the mere inclusion of some interactive capability should not be sufficient to transform video programming into non-video programming.[181] We noted, for example, that offering a consumer the ability to choose among several camera angles in viewing a sporting event, or to replay or fast-forward portions of a video program, does not change the nature of the underlying material. Despite LEC arguments to the contrary, we continue to find no principled basis for such distinctions, and we cannot conclude that Congress intended for us to make them. In fact, the legislative history of the 1984 Cable Act specifically distinguishes between video programming and subscriber interaction with a cable operator to select video programming, thereby indicating that Congress recognized their severability.[182] Moreover, eliminating the severability test would effectively allow LECs to bypass rules governing LEC provision of video programming by adding interactive functionalities to broadcast-comparable programs. For these reasons, we also reject Ameritech's claim that we should adopt a narrower definition of video programming to avoid violating LEC First Amendment rights. We believe that the definition we adopted in the Second Report and Order, and affirm herein, is narrowly tailored to achieve Congress's intent in adopting the cross-ownership ban.

111. We also reject BellSouth's contention that video-on-demand content is not severable from the interactive components of video-on-demand service. While consumers may, through features such as fast-forward and rewind, alter the images that they view, there is no reason why the telephone company cannot identify and sever the underlying program in its unaltered state. Moreover, contrary to BellSouth's claim, we do not believe that the level of subscriber control over video-on-demand images is such as to render the service more comparable to a gateway service than a traditional video programming service.

3. Federal/State Jurisdiction over Video Dialtone

Background

112. The Commission stated in the Second Report and Order that the basic video dialtone platform is presumptively an interstate service over which the Commission has exclusive jurisdiction,[183] and that the LEC video dialtone facility is an "integral component in an indivisible dissemination system which

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181 Id. at 5821-23, paras. 74-77.

182 House Cable Report, supra note 105, at 41, 43.

183 7 FCC Rcd at 5819-20, para. 72

forms an interstate channel of communication."[184] The Commission also concluded that existing jurisdictional determinations regarding enhanced services would apply to enhanced services provided by LECs as part of video dialtone.[185] The Commission noted, however, that it may need to address the extent of its jurisdiction in the context of specific Section 214 applications, depending on the particular video dialtone configuration proposed.[186]

Pleadings

113. Several state commissions seek reconsideration of the Commission's jurisdictional conclusions. Some state commissions seek clarification that the Commission never intended to assert exclusive jurisdiction over basic video dialtone service.[187] For example, New York State Department of Public Service (NYDPS) argues that, although the Commission suggested in the Further Notice that it would regulate the level one video dialtone platform under Title II of the Act, it never suggested it would assert exclusive jurisdiction over the platform.[188]

114. Some state commissions assert that Section 2(b) of the Act prohibits the Commission from asserting exclusive jurisdiction over the basic video dialtone platform, on the grounds that not all uses of the platform are interstate.[189] Some state commissions argue that the Commission's reliance on General Telephone as authority to assert exclusive jurisdiction over video dialtone is misplaced, and that video dialtone is significantly different from the "channel service" at issue in General Telephone.[190] For example, they assert that, in contrast to channel service, video dialtone may be

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184 Id. (citing General Telephone of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969) (General Telephone)).

185 7 FCC Rcd at 5819-20, para. 72

186 Id. at 5820, para. 73.

187 NYDPS Petition at 2-3; PaPUC Petition at 7.

188 NYDPS Petition at 2.

189 NARUC Petition at 2; California Petition at 6, 7 n.2.

190 NARUC Petition at 6-9; PaPUC Petition at 6; California Petition at 4-5. In General Telephone, the D.C. Circuit agreed with the Commission that the Communications Act requires a Section 214 certification for LEC provision of channel services. The court based its decision, in part, on the Commission's broad plenary jurisdiction over broadcasting. 413 F.2d at 401.

integrated with the current telecommunications network,[191] will provide potentially interactive services,[192] will provide services to multiple programmers, and will not require LECs or programmers to obtain a cable franchise.[193] Some assert that, given the Commission's admission that video dialtone configurations are uncertain, it is premature for the Commission to assert exclusive jurisdiction over video dialtone.[194]

115. State commissions place particular emphasis on the fact that many services to be provided over the video dialtone platform "have nothing to do with broadcasting."[195] NYDPS, for example, states that the video dialtone platform will provide for the provision of "nonprogramming video services" and "nonvideo communication services," which bear no resemblance to channel services.[196] For these reasons, state commissions assert, the Commission cannot conclude that video dialtone service constitutes a "link" in the "indivisible stream" of "interstate broadcast transmission."[197]

116. State commissions argue further that some video dialtone services, including video as well as non-video services, will likely be intrastate in nature.[198] They therefore contend that all non-broadcast signals transmitted over the video dialtone platform should be treated like telephone service and subject to dual jurisdiction.[199] Some state commissions contend that the Commission should regulate all signals transmitted over the common carrier

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191 NARUC Petition at 4, 7; PaPUC Petition at 6; BellSouth Comments at 10-11.

192 NARUC Petition at 4, 7. See also California Petition at 5-6.

193 NARUC Petition at 7; California Petition at 4.

194 NYDPS Petition at 4; PaPUC Petition at 2. BellSouth contends that the Commission should refrain from preempting states until it has an adequate record. BellSouth Comments at 12.

195 NYDPS Petition at 5. See also PaPUC Petition at 6; California Petition at 5-6.

196 Id. See also NARUC Petition at 8, 11.

197 Id. at 5 (quoting General Telephone).

198 NARUC Petition at 8-10; PaPUC Petition at 5; NYDPS Petition at 4.

199 NARUC Petition at 7-9, 11; California Petition at 7; BellSouth Comments at 11. See NYDPS Petition at 6-7.

video dialtone platform as ordinary telephone service.[200] The National Association of Regulatory Utility Commissioners (NARUC) argues that because the Act excludes intrastate services from FCC jurisdiction, the Commission cannot preempt state regulation of such video dialtone services unless the state's action negates the FCC's exercise of its authority over interstate service.[201]

117. BellSouth argues that, because the 1984 Cable Act gives states jurisdiction over non-cable intrastate services provided over cable systems, the states should have the same jurisdiction over those services when provided over a video dialtone system.[202] It states that the FCC may preempt state regulation "[i]f the precise subject matter of regulation cannot be severed for purposes of dual regulation, and the exercise of intrastate regulation over that matter will negate a valid federal policy."[203] California argues further that the FCC should require that LECs design video dialtone services and facilities to ensure that interstate and intrastate aspects can be jurisdictionally separated.[204]

118. Florida Cable Television Association (FCTA) urges the Commission to clarify that all video transport services are subject to FCC jurisdiction, in order to prevent jurisdictional forum shopping to evade relevant review processes.[205] FCTA argues that LECs are building video dialtone facilities and using such facilities to offer services such as video conferencing and medical imaging pursuant to state tariffs.[206] According to FCTA, "[b]y limiting...customers to 'non-broadcast' content, [LECs] have sought to bypass the FCC review otherwise required for video distribution."[207] According to BellSouth, point-to-point video transport services such as video conferencing and other video imaging transport services do not constitute video programming services and do not involve channel service or "transport of video programming directly to subscribers," which, according to

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200 NARUC Petition at 11-12; PaPUC Petition at 4-6; California Petition at 6-7.

201 NARUC Petition at 10. See BellSouth Comments at 12.

202 BellSouth Comments at 10-11.

203 Id. at 12. See also IBM Comments at 5.

204 California Petition at 8.

205 FCTA Petition at 11.

206 Id. at 7.

207 Id. at 7-8.

BellSouth, are the subject of the video dialtone proceeding.[208] Therefore, BellSouth argues, the Commission should reject FCTA's argument that LECs are trying to evade regulatory review.[209]

119. NARUC states that the FCC "cannot seriously contend" that states do not have jurisdiction under the Act to regulate portions of joint plant used for intrastate service, even if the plant is also used for video dialtone.[210]

120. Information Industry Association (IIA) argues that states should not regulate the provision of enhanced video dialtone services.[211] IIA asserts that such regulation by different states "would threaten the orderly development of video dialtone by establishing a patchwork of inconsistent or conflicting state regulatory requirements, in stark defiance of this Commission's conclusions on how best to protect consumers and serve the public interest."[212] As a result, IIA urges the Commission to "send a strong signal" that "jurisdiction of enhanced video dialtone services rests squarely in the national arena."[213]

Discussion

121. We now modify our assertion in the Second Report and Order of exclusive jurisdiction over all video dialtone services. We hold that we have exclusive jurisdiction over only interstate video dialtone services, which include services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. We hold that states have jurisdiction over intrastate video dialtone services.

122. In General Telephone, the court held that channel service provided by a LEC for a cable operator, formerly known as

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208 BellSouth Comments at 17-18. BellSouth argues further that FCTA's petition for clarification is really an untimely filed petition for reconsideration. Id. at 15-16. BellSouth states that the Commission must dismiss the petition, because the time limit for filing petitions for reconsideration is statutory and cannot be waived. Id. at 16.

209 Id. at 17-18.

210 NARUC Petition at 10.

211 IIA Comments at 4-5.

212 Id. at 5.

213 Id. at 6.

a community antenna television operator, is "an integral component in an indivisible dissemination system which forms an interstate channel of communication from the broadcaster to the viewer."[214] The court held that the Commission has exclusive jurisdiction over LEC provision of services that form part of a broadcast transmission.[215] Because broadcasting is inherently interstate, the court held, LEC delivery of signals that have been broadcast over radio waves is interstate, even if the LEC delivers such signals over physically intrastate facilities.[216]

123. Consistent with General Telephone, we conclude that broadcast or other radio-based video signals delivered by a LEC over a video dialtone system constitute an integral part of an interstate radio transmission service. Accordingly, we have exclusive jurisdiction over video dialtone services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. A determination of whether certain other, non-radio-based video dialtone services are interstate and thus within our exclusive jurisdiction depends upon the nature of the communication, as in the telephone context.[217] For example, we have exclusive jurisdiction over all video dialtone services provided between two or more states because such services are interstate. In contrast, under Section 2(b) of the Communications Act, states retain authority to regulate intrastate video dialtone service to the extent such regulation has not been preempted by the Commission under the standards set forth in Louisiana Public Service Commission and its progeny.[218] For example, states have jurisdiction over the delivery by wire of video programming between a video library and an end-user located within the same state, as part of a video-on-demand service.

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214 General Telephone, 413 F.2d at 401.

215 See Id.

216 See General Telephone, 413 F.2d at 401, 402; see also New York Telephone Company v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980) (New York Telephone).

217 See New York Telephone, 631 F.2d at 1066.

218 See, e.g., Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986); Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (1990); National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989). See also Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993).

124. While we do not in this proceeding preempt any state regulation of intrastate video dialtone services, we note that we have already preempted certain state regulations of BOC provision of enhanced services in the BOC Safeguards Order. In that decision, we preempted any state regulation requiring (1) separation of facilities and personnel to provide the intrastate portion of jurisdictionally mixed enhanced services; or (2) prior authorization for use of CPNI whenever such authorization is not required by our rules.[219] Because we have explicitly applied our existing enhanced services safeguards to video dialtone, state regulation in the areas preempted in the BOC Safeguards Order are also preempted by that decision in the video dialtone context. We reject various parties' requests for broader preemption at this time, but we will consider preempting any state regulation of intrastate video dialtone service that is not severable from interstate service if such regulation would negate federal policy.

B. Regulatory Framework and Safeguards

1. Section 214 Process

Background

125. Under Section 214 of the Act, LECs must obtain the Commission's approval before constructing or extending a line that it will use for interstate communications. In their Section 214 applications, LECs must describe in full the proposed facilities and the economic justification for their deployment. This showing must include, for example, detailed information regarding projected costs and revenues and the assumptions underlying these projections. LECs must also demonstrate that their facilities and proposed services will comply with the Commission's rules and policies.

126. In the Second Report and Order, the Commission required LECs to obtain prior authorization of video dialtone facilities pursuant to Section 214 of the Act.[220] The Commission stated that it would use the Section 214 process to examine particular video dialtone proposals for consistency with the public interest. For example, the Commission noted its intention to address the adequacy of existing safeguards to prevent cross-subsidization or discrimination by LECs against certain video programmers or

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219 BOC Safeguards Order, 6 FCC Rcd at 7631. This decision was recently affirmed in part by the U.S. Court of Appeals for the Ninth Circuit. California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12743, 12774-5 (9th Cir. October 18, 1994).

220 7 FCC Rcd at 5820, para. 73.

subscribers, as well as the extent of our jurisdiction over video dialtone, in the context of specific video dialtone proposals.[221]

Pleadings

127. Several LECs seek reconsideration of our decision to require Section 214 certification for video dialtone facilities.[222] Some LECs argue that we lack jurisdiction to require Section 214 certification for network upgrades for video dialtone because some video dialtone services will be intrastate in nature.[223] They argue that even though the Commission has required Section 214 certification for the construction by LECs of physically-intrastate stand-alone cable systems for cable operators, it has not otherwise required LECs to obtain Section 214 certification to transport video signals over physically intrastate facilities.[224]

128. LECs argue further that network upgrades for video dialtone fall outside the scope of Section 214 because that provision does not require certification for replacement of or changes to existing facilities.[225] Some LECs also urge the Commission to apply to video dialtone the statutory exceptions for local branch or terminal lines not exceeding ten miles in length.[226]

129. Several petitioners argue that the Section 214 process is burdensome and unnecessary, and will delay the introduction of

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221 Id. at 5820, 5823, paras. 73, 79.

222 Bell Atlantic Petition at 8; Bell Atlantic Reply Comments at 5-6. See also Ameritech Petition at 9; Ameritech Reply Comments at 9.

223 Ameritech Comments at 9; Bell Atlantic Petition at 7-8; Bell Atlantic Comments at 5.

224 Bell Atlantic Petition at 7-8.

225 Bell Atlantic Petition at 8 (citing 47 U.S.C. § 214(a)); PacTel Petition at 14; PacTel Reply Comments at 6; Ameritech Petition at 9; Ameritech Reply Comments at 9; NYNEX Comments at 4. See also USTA Comments at 16.

226 PacTel Petition at 14; PacTel Reply Comments at 6; Ameritech Reply Comments at 9; NYNEX Comments at 4. See also USTA Comments at 16.

video dialtone service.[227] For example, GTE states that the Commission has already made a public interest determination that LEC construction of broadband facilities to provide video dialtone is in the public interest; therefore, according to GTE, no further prior facilities authorization should be required.[228] GTE, along with several other petitioners, argue that the tariff review process, not the Section 214 process, is the appropriate vehicle for reviewing individual video dialtone proposals.[229] Similarly, NYDPS opposes using the Section 214 process to determine the jurisdictional nature of video dialtone service.[230]

130. A number of LECs ask the Commission to streamline the Section 214 process, either by limiting the number of proposals subject to the Section 214 requirement, or by establishing time limits on the processing of Section 214 applications.[231] Some LECs argue for expedited approval and a presumption of lawfulness for video dialtone proposals using already-approved technology or architecture.[232] The LECs also ask the Commission to apply its streamlined Section 214 processes for small projects and for

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227 GTE Petition at 4, 6-7; GTE Reply Comments at 7-9; Bell Atlantic Petition at 9; NYNEX Comments at 2. Some LECs argue that video programmers are less likely to discuss projects that require a Section 214 application. US West Petition at 10; PacTel Petition at 16.

228 GTE Petition at 4; GTE Reply Comments at 2-4, 8-9. According to GTE, Section 214 "was not statutorily designed as an approval mechanism for service offerings, but as a certification of the public need for deployment of facilities." GTE Reply Comments at 3. GTE adds that any application of the Section 214 certification requirement to services or to regulatory safeguards therefore constitutes a policy decision by the Commission, rather than a statutory requirement. Id. at 3 n.8.

229 GTE Petition at 5-7; GTE Reply Comments at 5-7; SNET Comments at 9; NYNEX Comments at 2; USTA Comments at 15; Bell Atlantic Reply Comments at 6; PacTel Petition at 16-17; PacTel Reply Comments at 7-9.

230 NYDPS Petition at 6.

231 PacTel Petition at 12-16; PacTel Reply Comments at 6-7; Bell Atlantic Petition at 9; US West Petition at 10-11; SNET Comments at 9; NYNEX Comments at 4-5; USTA Comments at 15-16; Ameritech Comments at 9; Ameritech Reply Comments at 9. See also PaOCA Comments at 11.

232 US West Petition at 11; NYNEX Comments at 5; PacTel Petition at 13. See also USTA Comments at 16; Ameritech Reply Comments at 9.

continuing authority.[233] Bell Atlantic asks the Commission to permit LECs to file "generic" applications, to avoid having to file applications on a community-by-community basis.[234] NYNEX requests that the Commission grant temporary approval before completion of the full Section 214 review.[235] NYNEX also opposes subjecting video dialtone trials to a Section 214 certification requirement.[236]

131. US West proposes a four to six month time limit for Commission action on Section 214 applications, and an automatic approval process absent Commission denial of the applications.[237] Pennsylvania Office of Consumer Advocate (PaOCA), states that it would not object to a six-month "auto-grant" procedure for conditional authority, if the application contains information on the proposed removal, separation, allocation and recovery of costs, and if carriers are required to disclose their treatment of costs in their tariff filings.[238] Bell Atlantic proposes a 30-day "auto-grant" procedure, with a 90-day time limit if the Commission begins an investigation.[239] Bell Atlantic argues that such a time limit will prevent competitors from "gaming" the process to avoid competition.[240]

132. Several parties dispute claims that we lack jurisdiction or authority to require Section 214 approval of video dialtone facilities. BellSouth, for example, contends that the Commission has exclusive jurisdiction over deployment of interstate video dialtone facilities, even if those facilities are also used to provide intrastate communication services. "To hold otherwise," according to BellSouth, "would necessarily grant state regulators veto power over the construction and provision of interstate

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233 PacTel Petition at 14-15; PacTel Reply Comments at 6; NYNEX Comments at 4 (citing 47 C.F.R. §§ 63.02, 63.03 and 63.07). NYNEX also asks us to clarify whether rules specifically applicable to channel service -- such as §§ 63.55 and 63.57 of the Commission's rules -- apply to video dialtone. NYNEX Comments at 4-5.

234 Bell Atlantic Petition at 9. See also NYNEX Comments at 4-5.

235 NYNEX Comments at 5-6.

236 Id. at 1-4.

237 US West Petition at 11 n.18. See NYNEX Comments at 4.

238 PaOCA Comments at 10.

239 Bell Atlantic Petition at 9; NYNEX Comments at 4, 5.

240 Bell Atlantic Petition at 9.

facilities and services."[241] Other parties challenge assertions that facility upgrades to provide video dialtone fall outside the scope of Section 214. PaOCA, for example, argues that Section 214 approval is required because video dialtone may require new construction and/or substantial costs.[242]

133. A number of parties also respond to assertions that the Section 214 process is unnecessary or that it should be streamlined. They argue that the full Section 214 review must be retained, given the Commission's reliance on the Section 214 process to address the adequacy of existing safeguards against cross-subsidization and discrimination.[243] For example, NCTA contends that the Section 214 review is the "only means for ensuring that video dialtone services are not anti-competitively structured or priced."[244] Several parties argue that full Section 214 review is required so that interested parties may participate in a meaningful fashion in reviewing the telephone companies' proposals.[245] Local governments assert that the tariff process is inadequate because the FCC is not required to consider as broad a range of public interest issues as in the Section 214 process.[246] CFA/CME argue that placing a time limit on Section 214 applications would stretch FCC resources, resulting in an inadequate review of Section 214 applications and/or a diversion of FCC resources from other important areas.[247] FCTA contends that the FCC is required to subject LECs to careful Section 214 review to ensure consistency with its policies.[248]

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241 BellSouth Comments at 12. See also IBM Comments at 3-4.

242 PaOCA Comments at 7-9. See also NCTA Comments at 7 n.14.

243 PaOCA Comments at 4-9; CFA/CME Comments at 13-14; NCTA Comments at 8; CLG Comments at 9.

244 NCTA Comments at 8.

245 Compuserve Comments at 5; CLG Comments at 9-10. See CFA/CME Comments at 14. CLG argues that Section 214 review gives local governments prior notice of service proposals, allowing them to take appropriate regulatory action. CLG Comments at 9-10.

246 CLG Comments at 10.

247 CFA/CME Comments at 15-16. CFA/CME also argue that such a deadline would be speculative, resulting in unreasonable deadlines. Id. at 16.

248 FCTA Comments, at 7 (citing NCTA v. FCC, 747 F.2d 1503, 1510 (D.C. Cir. 1984)).

134. Some petitioners argue that the Commission should not rely on Section 214 applications to address critical video dialtone issues, including technical standards and safeguards.[249] CFA and NCTA argue in their Joint Petition that the Commission should hold Section 214 applications in abeyance until it has instituted and completed a comprehensive proceeding further addressing cost allocations, separations, access charges, and safeguards relating to joint marketing and customer privacy.[250] Few parties support delaying Section 214 certifications.[251] Most commenters believe that such delay is unnecessary, would thwart the attainment of the Commission's video dialtone goals, and would prevent the collection of information necessary to evaluate the adequacy of existing rules and policies or to understand better how video dialtone networks and services are likely to develop.[252] Several LECs declare that the CFA/NCTA request is an anticompetitive tactic to keep LECs out of the video marketplace.[253]

135. In the alternative, CFA and NCTA argue that such Section 214 certificates should be conditioned on compliance with any additional video dialtone rules or safeguards the Commission eventually adopts.[254] Various parties support this alternative.[255]

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249 NAB Petition at 3, 11-12; CFA/CME Petition at 32; PaPUC Petition at 8-9; DCPSC Jt. Pet. Comments at 3. See also NCTA Comments at 8; SNET Comments at 8; Joint Petition at 5-7.

250 Jt. Pet. at 5-7; CFA/NCTA Reply Comments to Jt. Pet. Comments at 6. See also CFA/CME Petition at 25, 33.

251 NJCTA Jt. Pet. Comments at 3, 9; NJCTA Reply Comments to Jt. Pet. Comments at 7; Indiana/Michigan Jt. Pet. Comments at 3; see also, NASUCA Jt. Pet. Comments at 9-10.

252 See, e.g., USTA Jt. Pet. Comments at 2-3; Ameritech Jt. Pet. Comments at 3-5; Ameritech Reply Comments to Jt. Pet. Comments at 3-5; AT&T Jt. Pet. Comments at 2; World Institute Jt. Pet. Comments at 3-6; PacTel Jt. Pet. Comments at 2-3, 6; NYNEX Jt. Pet. Comments at 5-6; Broadband Reply Comments to Jt. Pet. Comments at 1-3, 5-6; SNET Jt. Pet. Comments at 7; BellSouth Jt. Pet. Comments at 8; Edison Jt. Pet. Comments at 1-2; Hale Reply Comments to Jt. Pet. Comments at 1; TIA Jt. Pet. Comments at 2, 6-7.

253 Ameritech Jt. Pet. Comments at 4-5; USTA Reply Comments to Jt. Pet. Comments at 3; PacTel Jt. Pet. Comments at 2-3. See also Broadband Reply Comments to Jt. Pet. Comments at 1-2; NYNEX Jt. Pet. Comments at 5-6; Bell Atlantic Jt. Pet. Comments at 1.

254 Jt. Pet. at 5; CFA/NCTA Jt. Pet. Reply Comments at 2 n.1.

NYDPS urges us to defer decisions regarding LEC recovery of costs of video dialtone trials pending completion of the comprehensive rulemaking advocated by the joint petitioners. NYDPS asserts that the Commission employed a similar approach for recovering the costs associated with implementation of equal access.[256]

Discussion

136. We now affirm our decision to require LECs to obtain approval pursuant to Section 214 of the Act before beginning construction of video dialtone facilities or offering video dialtone service. We reject arguments that we lack authority to require such approval or that we should refrain from exercising that authority at this time. Because video dialtone is based upon new and evolving technologies, the Section 214 process is critical to our ability to ensure that video dialtone is implemented in a manner that best serves the public interest. Nevertheless, we permit LECs to seek generic approval of those aspects of a video dialtone system that do not require case-by-case review. In addition, we anticipate that, over time, as the service evolves and precedents are established, it may no longer be necessary to require the same level of Section 214 scrutiny to future video dialtone offerings. We will consider, at that time, on our own motion or on petitions of parties, streamlining our Section 214 requirements for video dialtone offerings.

a. FCC Authority to Require Section 214 Certification

137. As an initial matter, we conclude that the Commission has jurisdiction to require LECs to obtain Section 214 certification to upgrade existing facilities to provide video dialtone. Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. Even facilities that are wholly located within a state are interstate for Section 214 purposes, if a LEC uses those facilities at least in part for interstate communications.[257] In General Telephone, the Commission stated that "[i]rrespective of the location of its physical facilities, the common carrier which...participates as a link in the relay of television signals is performing an interstate communications

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255 AT&T Jt. Pet. Comments at 2; NJBRC Reply Comments to Jt. Pet. Comments at 1 (specifically addressing the New Jersey Bell Section 214 application); NASUCA Jt. Pet. Comments at 3; NYDPS Reply Comments to Jt. Pet. Comments at 3.

256 NYDPS Reply Comments to Jt. Pet. Comments at 3-4.

257 See, e.g., New York Telephone, 631 F.2d at 1066; General Telephone, 413 F.2d at 402.

service."[258] It is clear from the video dialtone Section 214 applications filed to date that LECs will use video dialtone systems for interstate communications, including delivering video programming transmitted by means of radio waves.[259] Given the anticipated interstate use of video dialtone facilities, we hold that we have jurisdiction to require LECs to obtain Section 214 certification before upgrading facilities to provide video dialtone service.

138. We conclude further that an upgrade of LEC facilities to offer video dialtone service constitutes the establishment or extension of a "line" and entails "new construction," thus requiring Commission certification pursuant to Section 214.[260] In 1944, Congress amended Section 214 to define "line" as a "channel of communication established by appropriate equipment...."[261] In a case decided immediately after the provision was enacted, the Commission held that Section 214 required a carrier to obtain certification when it constructs new channels of communication by installing new carrier systems, as well as when it does so by laying wire.[262] By constructing video dialtone platforms, LECs will be installing new systems and laying fiber to create new channels of communication. If a LEC upgrades its network through installation of fiber and video dialtone-specific equipment, the network becomes capable of offering a far greater number of communication channels, as well as a new service -- video dialtone -- that it was not capable of providing before. The same conclusion applies if a LEC installs new equipment, such as

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258 General Telephone of California, 13 FCC 2d 448, 455 (1968), aff'd, General Telephone, supra note 184.

259 See, e.g., New Jersey Bell, supra note 38.

260 Section 214 requires certification for the construction of a "line," but does not require certification for "any installation, replacement, or other changes in plant, operation, or equipment, other than new construction...." 47 U.S.C. § 214(a).

261 See H.R. Rep. No. 142, 78th Cong., 1st Sess. 7 (1943). See also American Telephone and Telegraph Co., 10 FCC 315, 319 (1944) (AT&T Carrier).

262 See AT&T Carrier, 10 FCC at 321 (holding that AT&T's construction constituted "a major installation affecting service" and that excluding it from Section 214 review would be "anomalous" in light of the purpose of Section 214 -- "preventing improvident increases in facilities with consequent higher charges to the users of the service").

Asymmetric Digital Subscriber Line (ADSL) technology,[263] to be used with existing facilities. The Commission has found that similar activity triggers the Section 214 certification requirement.[264] Because video dialtone systems create new channels of communication, the systems constitute the establishment of lines under Section 214.

139. We also conclude that video dialtone systems involve "new construction." The exemption in Section 214 for "any installation, replacement, or other changes in plant, operation, or equipment, other than new construction" applies only if no new construction occurs, or any new construction or installation is minor.[265] Congress indicated that the provision was not intended to permit "communication carriers to make major installations or abandonments, or to modify existing installations to a degree that service is affected without first going to the Government regulatory agency for the authorizations duly provided by law."[266] The upgrading of existing facilities to be used for video dialtone generally constitutes substantial new construction,[267] and thus does not fall within this exemption. Most upgrades will not be achieved through minor changes in facilities, but rather through the wholesale replacement of existing facilities, typically costing

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263 ADSL technology permits a video signal to be delivered to residential subscribers along with basic telephone service over the same copper loop facilities, but additional equipment is also needed. See The Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993).

264 See American Telephone and Telegraph Company, 91 FCC 2d 1, 14 (1982) (installation of packet switches containing multiplexers constituted the establishment of channels of communication requiring a Section 214 certification); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 271 (1976) (resale carriers may have "substantial investment" in multiplexing or switching equipment, the addition of which creates new lines or channels under Section 214), aff'd sub nom. American Tel. and Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978).

265 Cong. Rec., 78th Cong., 1st Sess., p. 1093. The Conference Committee reported that the framers wanted to ensure that "carriers shall not be unduly burdened by unnecessary paper work, particularly in these wartimes...." Id.

266 Id.

267 See, e.g., New Jersey Bell, supra note 38; see also Pacific Bell, File No. W-P-C-6914; and Ameritech, File No. W-P-C-6929.

millions of dollars, including the removal and installation of substantial amounts of equipment.[268]

140. Furthermore, we conclude that new construction occurs even when LECs upgrade existing facilities to provide video dialtone through the addition of small amounts of equipment, because such upgrades enable the LECs to offer a new and different type of interstate service.[269] Section 214 requires a carrier to obtain certification before upgrading existing intrastate facilities for interstate service.[270] Thus, upgrading customer loops, which are currently used primarily for intrastate local exchange service, to provide video dialtone service, constitutes "new construction," and Section 214 certification is required. Moreover, because the construction of video dialtone systems does not constitute the construction of "local, branch, or terminal lines not exceeding ten miles in length," we reject arguments that we should apply the statutory exemption contained in Section 214(a)(2) of the Communications Act to LEC video dialtone Section 214 applications.[271]

b. Elimination or Streamlining of Section 214 Requirement for Video Dialtone

141. We decline to eliminate or streamline the Section 214 certification process at this time.[272] We reject arguments that the tariff review process is at this time, by itself, an adequate mechanism for overseeing video dialtone deployment. In the Second

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268 See AT&T Carrier, 10 FCC at 320 (Commission found that "[t]he establishment of carrier systems...required a substantial amount of construction in providing new wire lengths, buildings and other structures, and involved extensive construction work in removing voice frequency equipment and providing carrier equipment").

269 See supra paras. 121-124.

270 See New Jersey Bell, supra note 38.

271 See 47 U.S.C. § 214(a)(2); General Telephone, 413 F.2d at 403 ("Section 214(a)(2) was mean [sic] to permit nonsubstantial improvements or extensions for existing carrier facilities"). See also supra paras. 136-140.

272 NYNEX asks us to clarify the application of Sections 63.55 and 63.57 of the Commission's rules, 47 C.F.R. §§ 63.55, 63.57, to video dialtone. These provisions address channel service, not video dialtone, and thus do not apply to video dialtone service. In the Third Further Notice we seek comment on whether we should adopt an analogous rule for video dialtone service. See infra para. 285.

Report and Order the Commission emphasized that, because video dialtone is an emerging technology, and because we anticipate and encourage variations in network architectures, technology, and services, many important policy issues would likely be raised only in connection with specific video dialtone proposals.[273] We stated our intention to review these proposals carefully to ensure that video dialtone is implemented in a manner that best serves the public interest. Under the circumstances, streamlining our Section 214 process, by, for example, establishing time limits for the disposition of Section 214 applications or exempting trials, could preclude us from properly overseeing the implementation and monitoring the evolution of video dialtone.

142. For similar reasons, we also decline to limit the type of construction or deployment subject to full Section 214 review. While it may be that some video dialtone applications, such as those using already approved technology or architecture, may require less rigorous scrutiny than other applications, we do not believe that it is necessary or wise to mandate special procedures for such applications. Particularly during the early stages of video dialtone implementation, even those applications that use previously approved architectures may pose other issues that warrant careful consideration in the context of that specific proposal. For instance, many of the video dialtone applications currently on file with the Commission use a hybrid fiber-coaxial architecture but propose service arrangements that differ in other respects. Our processing of Section 214 applications also enables the Commission to consider other factors that may be relevant to the determination of whether a proposed video dialtone service will serve the public interest, convenience and necessity, such as whether the proposal is economically justified and complies with the Commission's rules and policies, and the extent to which the state in which the service is proposed authorizes competition for local exchange services. In addition, the Commission can weigh the effect of other measures that may have been adopted by state regulators to protect ratepayers, such as price caps for residential service rates, or other policies that limit the ability of LECs to raise prices to captive ratepayers of local telephone services.

143. While we therefore do not streamline our Section 214 process at this time, we will consider generic applications for approval of those aspects of a Section 214 application that do not require case-by-case consideration.[274] These generic applications

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273 Second Report and Order, 7 FCC Rcd at 5840, para. 117.

274 A LEC might file a generic application, for example, to seek approval of a proposal, to be implemented on multiple video dialtone systems, for meeting our capacity requirement or for a

can serve to narrow the range of issues to be considered in the Section 214 process. We also note that we anticipate that, as video dialtone evolves, and we develop a body of precedent governing its implementation, the Section 214 process may become a less critical vehicle for identifying and addressing policy issues, thereby making streamlining appropriate at that time.

144. Finally, as another possible means of expediting the Section 214 process, we direct the Bureau to consider whether it would serve the public interest to clarify in a Public Notice the basic information that the Commission requires in a video dialtone Section 214 application. We note that the Bureau has found it necessary to request additional information from LECs in connection with the Bureau's review of virtually every application that has been filed for Section 214 authorization to construct a commercial video dialtone system.[275] Further clarification of the information required in a Section 214 application could help LECs avoid the delays that necessarily result when applications have to be supplemented.[276]

c. Delaying Section 214 Certifications

145. Some petitioners also ask that we delay processing of Section 214 applications until we undertake a comprehensive review of our cost allocation rules and other safeguards for video dialtone. We determined in the Second Report and Order and affirm now that our existing rules and safeguards generally will prevent improper cross-subsidization and discrimination by LECs in the

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channel sharing mechanism. A subsequent LEC Section 214 application proposing such capacity or channel sharing arrangements would need only cross-reference the previously approved generic application. LECs would, however, have to provide any additional information otherwise required for consideration of that subsequent application.

275 See, e.g., New Jersey Bell, 9 FCC Rcd at 3678, para. 3; Letter, dated April 28, 1994, from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Anthony M. Alessi, Director, Federal Relations, Ameritech; Letter, dated August 26, 1994, from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to Alan F. Ciamporcero, Executive Director, Federal Regulatory Relations, Pacific Telesis Group.

276 We are relying on the Bureau to review applications for Section 214 authority with care. Accordingly, we caution carriers that processing of Section 214 applications may be delayed if the applications do not contain necessary information or if information sought by the Bureau staff is not provided.

provision of video dialtone.[277] Therefore, we do not believe that an additional comprehensive review of these rules is necessary prior to the implementation of video dialtone service. Indeed, to the extent that any further changes in these rules may be necessary, permitting deployment of video dialtone should provide us with a better basis for fashioning such changes. We thus decline to defer consideration of Section 214 applications pending a comprehensive review of our rules. We will, however, condition the granting of each Section 214 certificate on implementation of any accounting and other safeguards that we have adopted or subsequently adopt.[278] Contrary to several petitioners' arguments, we do not think that considering the need for additional safeguards on a case-by-case basis would result in inconsistent regulatory treatment. Rather, such an approach will ensure that the safeguards imposed in each case will consider unique facts associated with that video dialtone offering.

2. Cross-Subsidy/Pricing Issues

Background

146. Costing Rules. The Commission's accounting and cost allocation rules were originally developed as part of a program of rate base/rate of return regulation (ROR) of interstate telephone rates. The rules remain in full effect, although their role in the development of rates is greatly attenuated for the largest companies, almost all of which are now subject to price cap regulation.

147. Under ROR, rates are tied directly to costs, and much regulatory attention is devoted to the identification of the costs to be assigned to a particular regulated service. Cost allocations are made because most of the costs of interstate telephone services are joint and common costs. That is, costs are shared with intrastate telephone services, with other interstate services, and often with various nonregulated activities of the company. Over time, the Commission developed rules governing all of these cost allocations.[279]

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277 See infra paras. 146-223.

278 The Commission has applied such accounting safeguards to video dialtone applications already processed. See, e.g., New Jersey Bell, 9 FCC Rcd at 3685-6, paras. 42-43, 72.

279 See Separation of the Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Notice of Proposed Rulemaking, 104 FCC 2d 59, 63-78 (1986)(Joint Cost NPRM) (review of the Commission's historical involvement with cost allocations).

148. The regulated company records its costs and revenues in accordance with Part 32 of the Commission's Rules, the Uniform System of Accounts for Telecommunications Companies (USOA).[280] The USOA is a historical financial accounting system that incorporates generally accepted accounting principles (GAAP) where consistent with regulatory needs. Investment and expense accounts are designed to record costs in accordance with the functions of equipment and people; the USOA does not allocate costs between regulatory jurisdictions or among services.

149. Costs recorded in Part 32 accounts are separated between regulated and nonregulated activities in accordance with the Joint Cost rules (Part 64).[281] The Joint Cost rules use a fully distributed costing (FDC) approach: most costs are either directly assigned or are apportioned on a cost-causative basis, with all remaining overheads allocated using a general allocator.[282] Large carriers must file cost allocation manuals (CAMs) that describe specifically how they group costs into homogeneous cost pools and how they allocate costs in those pools to nonregulated activities. CAMs are public documents reviewed by Commission staff after opportunity for public comment.

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280 47 C.F.R. §§ 32.1-32.9000. Local exchange carriers that are fully subject to the Communications Act are required by the Commission to use the USOA. Most other local exchange carriers, i.e., "connecting carriers" described in Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2), are required by their state regulatory commissions or as conditions to Rural Electrification Administration (REA) loans to use the USOA.

281 47 C.F.R. §§ 64.901-64.904; see Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). The Joint Cost rules were promulgated under authority of Sections 201-205 of the Communications Act as well as under Section 220, and therefore apply both to LECs that are fully subject carriers and to LECs that are connecting carriers. Joint Cost Order, 2 FCC Rcd at 1309, para. 82.

282 The Commission chose an FDC approach for nonregulated activities not because that approach was necessary to prevent improper cross-subsidization, but because the Commission determined that ratepayers should share in any economies of scale and scope that could be achieved through integration of basic and enhanced services. Joint Cost Order, 2 FCC Rcd at 1312, para. 109. The Part 64 rules produce aggregated nonregulated costs; they do not provide for allocation of costs to specific nonregulated activities.

150. The regulated costs of most LECs are separated between the state and interstate jurisdictions in accordance with the Jurisdictional Separations Manual (Part 36).[283] Under Section 410(c) of the Communications Act, changes to the separation of common carrier property and expenses that are instituted pursuant to notice and comment rulemaking must be referred to a Federal-State Joint Board.[284] Part 36 is an FDC system that, in the most general of terms, separates costs in accordance with the relative state and interstate usage of telecommunications plant. Local loop plant, however, which comprises about 37.6% of total plant in service and 44.2% of network plant, is separated based on a fixed allocation factor: 25% of the costs flow to the interstate jurisdiction, 75% of the costs flow to the states.[285] Part 36 definitively assigns costs and revenues as between the regulatory jurisdictions, but neither the states nor the Commission are obliged by Part 36 to use in ratemaking the particular cost allocations that are made for separations purposes.

151. The Commission's access charge rules (Part 69) start with the costs allocated to the interstate jurisdiction under Part 36 and further apportion those costs among interstate access rate elements and subelements and the interexchange category on an FDC basis.[286] To the extent it prescribes rate elements, Part 69 governs

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283 47 C.F.R. §§ 36.1-36.741. Some small LECs set their interstate access rates under an average cost schedule prepared by the National Exchange Carrier Association, Inc. (NECA). State regulators may, if they wish, determine intrastate revenue requirements by the residual cost method of subtracting the average schedule revenues from total regulated costs, rather than by applying Part 36. See Crockett Telephone Co. v. FCC, 963 F.2d 1565 (D.C. Cir. 1992).

284 47 U.S.C. § 410(c).

285 1991 ARMIS figures. This allocator does not represent an approximation of state and interstate use of the loop, but was a negotiated factor developed by the Joint Board. See Amendment of Part 67 of the Commission's Rules, CC Docket 80-286, 49 Fed. Reg. 7934 (March 2, 1984). The Separations Manual incorporates certain explicit subsidies running from interstate services to the local exchange services of certain carriers. See 47 C.F.R. §§ 36.601-36.641 (Universal Service Fund support for study areas with high loop costs); 47 C.F.R. § 36.125 (interstate assistance to switching costs of small study areas).

286 See Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdictional Procedures, 2 FCC Rcd 6447 (1987), modified on recon., 4 FCC Rcd 765 (1988).

the rate structure of interstate access services.[287] For those carriers that remain subject to ROR, the FDC costs assigned to rate elements by Part 69 also have a direct effect on rate levels.

152. Pricing rules. Since 1991, most large LECs have been subject to price cap regulation under Part 61.[288] Prices for services that were offered at the time of the initial implementation of price cap regulation were based on a carrier's existing rates, as developed under ROR. Rates for services offered for the first time under price cap regulation are reviewed initially under a cost-based test developed for price caps, but are excluded from the calculation of the price cap indices. New services are brought into the price cap indices in the carrier's next annual price cap tariff filing after the completion of the base year in which the service is first offered.

153. Once under price caps, the rates are no longer tied directly to allocated costs. Rather, prices are limited by a formula that permits increases to reflect changes in inflation, offset by an amount reflecting expected productivity gains, and adjustments for changes in exogenous costs. The carrier's ability to offset price decreases in some services with increases in others is restricted by the grouping of services into baskets and, within baskets, into service categories.

154. The LEC price cap plan, unlike the price cap plan for AT&T, retains a connection between total interstate costs and overall rate levels by means of sharing and lower end adjustment mechanisms. Sharing requires LECs with interstate earnings greater than specified levels in one calendar year to return half of the additional earnings (and all earnings above an upper limit) to ratepayers in the form of lower rates in the next rate period.[289] The lower end adjustment allows LECs that earn below 10.25% to

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287 The rate structures of switched access services are prescribed in some detail. By contrast, there are no prescribed subelements for private line and other special access services. See 47 C.F.R. §§ 69.101- 69.128 (1993).

288 47 C.F.R §§ 61.41-61.49 (1993); see Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Price Cap Reconsideration Order), aff'd., National Rural Telecom Ass'n. v FCC, 988 F.2d 174 (D.C. Cir. 1993).

289 LECs that use a productivity offset of 3.3% in the price caps formula must share 50% of earnings above 12.25% and 100% of earnings in excess of 16.25%. For a LEC that elects to use a productivity offset of 4.3%, the earnings benchmarks are 13.25% and 17.25%. LEC Price Cap Order, 5 FCC Rcd at 6788, paras. 7-8.

raise rates in the following rate period above the levels that would otherwise be permitted by the price caps formulas.[290]

155. Carriers that remain subject to ROR set their interstate access rates to recover the costs allocated to the various access categories and elements, plus a prescribed return on investment, currently 11.25%.[291] Some carriers file rates based on their own costs, some participate in pooled rates, and some use an average cost schedule. There is also an optional incentive plan that permits medium-sized LECs to change prices according to established banding limits.[292]

156. The Second Report and Order. In the Second Report and Order, the Commission stated that: (a) existing safeguards (as described above) designed to prevent improper cross-subsidies would apply to LEC provision of video dialtone service; (b) it would closely monitor these rules as applied to specific video dialtone proposals; and (c) it would impose additional safeguards if necessary.[293] The Commission also determined that changes in Parts 36 and 69 would better be addressed in the context of a comprehensive review of those rules rather than in a proceeding focused solely on video dialtone.[294]

a. Overview

Pleadings

157. Several petitioners and the Joint Petition argue that existing safeguards against cross-subsidy are inadequate and request that the Commission adopt safeguards specifically designed for video dialtone service offerings prior to service

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290 Carriers making the low end adjustment are permitted to raise rates sufficiently to target earnings to 10.25% in the following year. Id. at 6801-02.

291 Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 (1990), recon. den., 6 FCC Rcd 7195 (1991), aff'd, Illinois Bell Telephone Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

292 See 47 C.F.R. § 61.50. One LEC, Cincinnati Bell Telephone Company, has elected this plan. See Cincinnati Bell Telephone Company Revisions to Tariffs F.C.C. Nos. 35 and 40, Transmittal No. 636, 9 FCC Rcd 353 (Com. Car. Bur. 1994).

293 Second Report and Order, 7 FCC Rcd at 5827-30, 5840, paras. 89-93, 116-17.

294 Id. at 5840, para. 116.

authorization.[295] The Joint Petition argues that, because of the high cost of deploying a ubiquitous fiber optic network, any misallocation of costs to basic telephone services could have a large impact on monopoly ratepayers.[296] According to the study attached to the Joint Petition, $100-$200 billion is a reasonable estimate of nationwide broadband investment costs. As evidence of the potential for unjustified basic telephone service rate increases, the Joint Petition cites a 1992 study that concluded that a particular proposal for accelerated deployment of a fiber-to-the-home architecture in Pennsylvania would have caused revenue requirements per access line in that state to increase by $20 per month.[297] Joint petitioners and others contend that separate video dialtone accounts, new cost allocation and jurisdictional separations rules, access elements and a price caps basket must all be established before video dialtone can be offered.[298]

158. Several parties oppose reliance on incremental costing to determine video dialtone pricing issues, and disagree with LECs contending that video dialtone only involves incremental costs.[299] They argue that LEC fiber deployment is intended to carry both voice and video services and that some portion of the costs of that joint and common investment should be allocated to video dialtone.[300] The parties request that the Commission either adopt a fully distributed costing methodology or modify its existing incremental costing methodology to include joint and common costs.[301]

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295 See, e.g., CFA/CME Petition at 24-32; PaPUC Petition at 2, 7-13; NCTA Petition at 3, 11-12; Joint Petition at 1, 5-10.

296 Hatfield Study at 28-29.

297 Jt. Petition at 3, 14; Hatfield Study at 2, 30, citing Page Montgomery, Accelerated Broadband Networks: The Costs and Risks, February, 1992, p.29.

298 See, e.g., DCPSC Petition at 2-6; Joint Petition at 5-10; NARUC Petition at 11-12; PaPUC Petition at 7-13; NCTA Petition at 7-9; see also CCTA Comments at 14.

299 See, e.g., Hatfield Study at 8-9, 22-23 attached to the Joint Petition); AT&T Jt. Pet. Comments at 8; CFA/NCTA Jt. Pet. Reply Comments at 12.

300 See, e.g., Hatfield Study at 8-9, 22-23.

301 See, e.g., Hatfield Study at 22-23; AT&T Jt. Pet. Comments at 8; Economics and Technology, Inc. (ETI) Study at 6-8 (attached to the NJCTA Jt. Pet. Comments). See infra paras. 214-221.

159. Parties opposing the petitions and the Joint Petition argue that existing safeguards sufficiently protect against anticompetitive behavior.[302] They contend that the Joint Petition does not raise arguments that have not already been considered and rejected in the Second Report and Order.[303] They also argue that requests for rule changes are premature given video dialtone's evolving nature.[304] Moreover, some parties argue that regulation is unnecessary because LECs offering video dialtone have no market power as new entrants competing against established video monopolies.[305] Finally, BellSouth argues that the Commission has already rejected the use of fully distributed costing for pricing regulated services of price cap carriers.[306]

160. Several parties also urge that, if the Commission decides to address these issues, it should do so as part of a comprehensive proceeding that is not limited to an analysis of video dialtone service.[307] Some parties state that such a proceeding should not delay video dialtone deployment.[308] Other parties request that the Commission's inquiry focus on the convergence of cable and telephone technologies and that it should apply the resulting rules equally to both cable companies and the LECs.[309]

Discussion

161. We conclude that initial video dialtone service offerings by LECs subject to price cap regulation should be subject

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302 See, e.g., Bell Atlantic Comments at 6-8; GTE Comments at 6-8; Ameritech Reply Comments at 5; USTA Jt. Pet. Comments at 6-9.

303 See, e.g., OPASTCO Jt. Pet. Reply Comments at 3-4; GTE Jt. Pet. Comments at 3-9; Broadband Jt. Pet. Reply Comments at 3-4.

304 See, e.g., GTE Comments at 7-8; SNET Jt. Pet. Comments at 11; USTA Jt. Pet. Comments at 8-9; TIA Jt. Pet. Comments at 5-6.

305 See, e.g., SWBT Petition at 3-5; U.S. West Jt. Pet. Comments at 4-6. See infra para. 203; see also infra para. 205.

306 BellSouth Jt. Pet. Comments at 10.

307 See, e.g., OPASTCO Jt. Pet. Reply Comments at 5; BellSouth Jt. Pet. Comments at 2-3; PacTel Jt. Pet. Comments at 5-6; GTE Comments at 7.

308 See, e.g., PaOCA Comments at 11; BellSouth Comments at 7-9; NYNEX Comments at 5 n.9; Broadband Jt. Pet. Reply Comments at 3-4.

309 See, e.g., GTE Jt. Pet. Reply Comments at 6-8; Bell Atlantic Jt. Pet. Comments at 12-15; NASUCA Jt. Pet. Comments at 11.

to the existing price cap rules. Proceeding under existing price cap rules is consistent with eliminating regulatory barriers and distorted incentives to efficient investment in telecommunications facilities, thereby serving our goals of increasing video services competition and investment in telecommunications infrastructure, and promoting greater diversity of video programming. We also conclude that these rules, as further delineated below, should protect telephone ratepayers from improperly subsidizing video dialtone service.

162. As Joint Petitioners point out, LECs, along with other telecommunications providers, may, over time, invest billions of dollars to build a modern telecommunications infrastructure. We share their concern regarding possible effects of video dialtone investment on basic regulated telephone rates, and possible anticompetitive results with respect to cable television service and other multichannel video programming distributors. We are committed to implementing video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization. We do not, however, agree that ratepayer protection requires that this Commission adopt comprehensive, video dialtone-specific accounting and cost allocation rules before authorizing video dialtone services.

163. Contrary to the arguments of the Joint Petitioners, this Commission's actions in authorizing interstate video dialtone services will not require increases in telephone rates on the order of $20 per month to pay for the cost of a nationwide fiber-to-the-home network. No LEC Section 214 application for video dialtone service has proposed a fiber-to-the-home architecture, and it appears unlikely based on the record that anyone will. In addition, where integrated networks are proposed, much of the investment will be used in the provision of intrastate telephone services, and will require the necessary state regulatory approvals.[310] We also note that investment in video dialtone will,

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310 In New Jersey, for example, the Board of Regulatory Commissioners, acting pursuant to state legislation authorizing alternative forms of regulation for LECs, has approved a plan under which Bell Atlantic-New Jersey is to accelerate construction of an advanced broadband network that includes video dialtone capability. As part of this plan, basic residential telephone service rates are frozen through 1999. The New Jersey BRC has urged this Commission to expedite authorization of video dialtone applications in New Jersey. See Jt. Pet. Reply Comments of NJBRC at 1-2. Similarly, in Pennsylvania, Chapter 30 of the Public Utility Code, 66 Pa. C.S. §§ 3001-3009, requires accelerated deployment of a broadband network as part of any alternative regulation. The Pennsylvania Public Utility Commission on June 23, 1994, approved a plan under which Bell Atlantic-Pennsylvania is to deploy a statewide broadband network; this plan freezes basic residential and business rates

of necessity, proceed over a period of years, permitting federal and state regulators to monitor the results of the initial deployments and take any actions that might be needed to prevent large amounts of video dialtone investment from being improperly shifted to ratepayers.

164. We decline, however, to adopt technology-specific cost accounting rules. The record in this proceeding demonstrates that such cost accounting rules can be rapidly overtaken by technological or marketplace changes. Joint Petitioners, for example, supported in their pleadings the establishment of accounts to identify loop investment as either copper or fiber. Such accounts, had we adopted them in 1992, would no longer serve the purposes envisioned by their proponents because carriers have since that time developed proposals to incorporate a third transmission medium, coaxial cable, into the loop.

165. While we do not propose to amend Parts 32, 64, 36, and 69 of our rules before authorizing video dialtone services, we find that adjustments are necessary to fit video dialtone into our regulatory program. These adjustments, which will be implemented on a case-by-case basis and do not require further rulemaking at this time, are explained below.

166. We view the price cap regulatory regime, and not the Part 36/Part 69 cost allocation scheme, as our primary means of protecting the telephone customers of price cap LECs from unreasonably high rates. Under price caps, a LEC has no guarantee that it will be able to recover increased costs in telephone rates. Its incentive to "shift" costs from video dialtone to regulated telephone services is thus greatly reduced.[311]

167. In addition, the price cap baskets and service categories limit the extent to which price reductions in one service can be offset by price increases in another. We conclude that a separate price caps basket for video dialtone services may be necessary both to protect interstate telephone ratepayers and to deter anti-competitive pricing of video dialtone services.

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through 1999. See Pennsylvania Public Utility Commission, Opinion and Order in Docket No. P-00930715 (adopted June 23, 1994).

311 In the future, LEC incentives and ability to shift costs and cross-subsidize may be reduced even further by the introduction of competition in the provision of local exchange telephone services.

Therefore, in the Price Caps Performance Review docket,[312] we will seek comment on a proposal to establish that basket.

168. We recognize that LECs under ROR or the optional incentive plan may also wish to develop video dialtone services. Such carriers will bear the burden of demonstrating to us how they will ensure that the costs of video dialtone will not be improperly recovered in the rates charged for other interstate services. They, like the price cap LECs, will also be required to comply with the other safeguards adopted in this Order.

169. We deny requests by parties that seek a comprehensive examination of both jurisdictional separations and access charge rules in this proceeding. As explained above, we believe our existing rules adequately protect consumers against improper cross-subsidy and anti-competitive activity at this time. As video dialtone systems are implemented and we gain more experience with this new service, we can amend our rules if necessary or appropriate to address unanticipated problems or results. We agree that long-term video dialtone cost allocation issues would be a part of any comprehensive review of Parts 36 or 69. We do not think, however, that the public interest would be well served by postponing for consumers the benefits that video dialtone services may offer pending the commencement and completion of such proceedings. Therefore, and for the reasons discussed in more detail below, we reject requests for adoption of video dialtone-specific accounting, cost allocation, separations, and pricing rules prior to granting video dialtone authorizations.[313]

b. Part 32 -- Uniform System of Accounts for Telecommunications Companies

Pleadings

170. The Joint Petition argues that for accounting to have any value as a safeguard against cross-subsidization, voice and

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312 See Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994) (Price Cap Performance Review).

313 Because we deny, for the most part, the Joint Petition for Rulemaking, we do not reach the suggestions of GTE, NASUCA, and others that such a rulemaking focus on the convergence of cable and telephone technologies and on creation of a single set of rules for both industries. Furthermore, the question whether, in light of the different statutory regimes governing cable and telephone, we can and should develop a single set of rules for both industries is beyond the scope of our proceeding on reconsideration in this docket.

video investment must be segregated, either in separate subaccounts or new accounts.[314] Numerous commenters support the Joint Petition and ask the Commission to amend Part 32.[315] Some parties contend that the cost accounting requirements should apply either specifically to broadband services, or should identify investment on the basis of network architecture.[316] AT&T, NTCA, and PacTel state that if the Commission decides to amend Part 32, it should do so for all LEC network costs and not just video dialtone costs.[317]

171. LECs generally defend the adequacy of the current Part 32 rules.[318] They argue that Part 32 is not intended to be a cost accounting system that captures product- or service-specific costs, but rather a functional accounting system that consistently captures core financial data despite rapid technological change.[319] In addition, Ameritech opposes distinguishing between broadband and narrowband networks in the Commission's accounting system because in the future integrated voice, data, and video services will be transmitted on the same network.[320]

Discussion

172. We reject the parties' requests that we amend our accounting rules to require carriers providing video dialtone to segregate all video plant investment in new Part 32 accounts or separate subaccounts. Part 32 accounting rules were designed to create a stable basic account structure that would not require modifications as technologies, services, or reporting requirements change. As Part 32 specifically states, "because of the variety and continual changing of various cost allocation mechanisms, the

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314 Joint Petition at 17, Hatfield Study at 24-25.

315 See, e.g., AT&T Jt. Pet. Comments at 7-9; NASUCA Jt. Pet. Comments at 10-11; DCPSC Jt. Pet. Comments at 4; NJCTA Jt. Pet. Reply Comments at 1-3; Indiana/Michigan Jt. Pet. Comments at 2.

316 See, e.g., CompuServe Jt. Pet. Reply Comments at 4-5; NASUCA Jt. Pet. Comments at 10-11.

317 AT&T Jt. Pet. Comments at 8; PacTel Jt. Pet. Reply Comments at 7-8; NTCA Comments at 3.

318 See, e.g., Ameritech Jt. Pet. Comments at 6-7; PacTel Jt. Pet. Reply Comments at 7-8; NYNEX Jt. Pet. Comments at 9; US West Jt. Pet. Comments at 13-14.

319 See, e.g., BellSouth Jt. Pet. Comments at 10-12; PacTel Jt. Pet. Reply Comments at 7-8; SNET Jt. Pet. Comments at 7-8.

320 Ameritech Jt. Pet. Comments at 6-9.

financial accounts of a company should not reflect an *a priori* allocation of revenues, investments or expenses to products or services, jurisdictions or organizational structures."[321] Thus we conclude that, as a general matter, it is inconsistent with the nature and purpose of the USOA to create new accounts just because a carrier is offering a new service.

173. We further conclude that, in the case of video dialtone, our regulatory information needs can be satisfied without making permanent changes to the accounting system at this time. Because it would help our monitoring effort and tariff review process to have a record of LEC video dialtone costs, we hereby require that LECs offering video dialtone identify all video dialtone costs by establishing two sets of subsidiary accounting records: one to capture the revenues, investments and expenses wholly dedicated to video dialtone, the other to capture any revenues, investments and expenses that are shared between video dialtone and the provision of other services.[322] These accounting records will also assist state regulators in assuring that video dialtone costs are not improperly included in local rates. LECs authorized to provide video dialtone must file a summary of these subsidiary records with the Commission on a quarterly basis. All video dialtone Section 214 authorizations will be conditioned upon compliance with this requirement.[323] We delegate to the Chief, Common Carrier Bureau, the authority to determine the content and format of the subsidiary accounting records as well as the quarterly reports.

c. Part 64 -- Separation of Regulated and Nonregulated Costs

Pleadings

174. Several petitioners and the Joint Petition claim that the Commission's Part 64 rules are unproven and will not prevent cross-subsidization and other anticompetitive conduct by LECs engaged in the provision of regulated and nonregulated video

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321 47 C.F.R. § 32.2(c)(1993).

322 See 47 C.F.R. §32.12(c)(1993). We authorize the Commission's staff to issue Responsible Accounting Officer (RAO) letters, if necessary, in order to ensure uniform accounting treatment of video dialtone costs.

323 In addition, carriers that fail to comply with these requirements are subject to forfeiture under Section 220(d) of the Communications Act.

dialtone services.[324] They also argue that LECs have a history of cross-subsidization and that the Commission lacks the resources needed to provide effective oversight.[325] CFA/CME request that, at a minimum, LEC video dialtone nonregulated activity be conducted through a fully separated subsidiary; or that the scope of permissible nonregulated activities be limited.[326] Pennsylvania Public Utility Commission (PaPUC) claims that the Commission's accounting safeguards are inadequate to detect cross-subsidies because the current rules do not contemplate the use of joint cable/telephone company facilities.[327] NASUCA argues that current rules would permit carriers to accelerate depreciation on investment used to provide telephone service to generate funds for investment in video delivery facilities, and that it would be unfair for telephone ratepayers to bear the burden of such depreciation changes.[328]

175. The Joint Petition further argues that the LECs' CAMs used to separate regulated and nonregulated costs are inadequate because they fail to separate video from telephone services, and do not earmark the costs of LEC enhanced services offered on the regulated video dialtone platform.[329] It also contends that Part 64 would not prevent investment in video dialtone from being recovered from telephone ratepayers should the service fail, since Part 64's fully distributed costing approach does not assign to video dialtone the higher joint costs of a video dialtone-capable network.[330] Finally, the Joint Petition argues that the Commission has yet to define which enhanced functions would be subject to direct assignment and which would be categorized within the common cost categories.[331]

176. The Joint Petition specifically requests that the Commission mandate CAM modifications to identify and attribute previously-expensed video dialtone items, and that the FCC review

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324 See, e.g., CFA/CME Petition at 25-32; California Petition at 7 n.2; PaPUC Petition at 7-9; Joint Petition at 19-20.

325 See, e.g., CFA/CME Petition at 28-32.

326 CFA/CME Petition at 32.

327 PaPUC Petition at 9.

328 NASUCA Jt. Pet. Comments at 8.

329 Joint Petition at 19-20; Hatfield Study at 19-20.

330 Hatfield Study at 19-21.

331 Id.; CFA/NCTA Jt. Pet. Reply Comments at 15-17.

such CAMs to ensure that directly assignable video dialtone costs are in fact being directly assigned.[332] Moreover, it asks that the Commission's Automated Reporting and Management Information System (ARMIS) be refined to capture data necessary to enforce cost allocation and accounting rules with respect to video dialtone.[333]

177. LECs argue in opposition that the existing Part 64 rules adequately prevent subsidization of a company's nonregulated business activities.[334] They argue that it is unnecessary to distinguish between video and other enhanced services to prevent improper cross-subsidization.[335] Several LECs maintain that the Joint Petition misunderstands the relationship between Part 32 and Part 64 and does not show how those rules fail to prevent cross-subsidy.[336] Furthermore, Ameritech disputes that ratepayers would bear the burden of unsuccessful LEC video dialtone investments, and argues that the current rules expressly prohibit the reallocation of investment from nonregulated to regulated categories.[337]

178. Ameritech also requests clarification that there is no presumption in favor of structural separation for the LEC provision of video dialtone. It argues that such a presumption would be at odds with the FCC findings that separate subsidiaries are no longer necessary to protect against potential LEC abuses in the provision of enhanced services.[338] NYNEX opposes modifying ARMIS because it believes that current ARMIS reports adequately track video dialtone costs, including the cost of deploying fiber.[339] World Institute argues that the Joint Cost rules can always be strengthened at a later date, if necessary, but opposes the rule changes proposed in

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332 Joint Petition at 20, n.43, Hatfield Study at 27.

333 Joint Petition at 20, n.43. Accord, CompuServe Jt. Pet. Reply Comments at 5; NJCTA Jt. Pet. Comments at 4-7, 11.

334 See, e.g., GTE Comments at 6-7; SNET Jt. Pet. Comments at 11-12; US West Jt. Pet. Comments at 11-13.

335 See, e.g., Ameritech Jt. Pet. Comments at 10-11; NYNEX Jt. Pet. Comments at 9-10.

336 See, e.g., BellSouth Jt. Pet. Comments at 12; NYNEX Jt. Pet. Comments at 10.

337 Ameritech Jt. Pet. Comments at 11.

338 Ameritech Petition at 15-17.

339 NYNEX Jt. Pet. Comments at 15.

the Joint Petition if they provide an insurmountable barrier to the development of a broadband telecommunications network.[340]

Discussion

179. We reject claims that we should amend Part 64 because current rules would not prevent LECs from improperly subsidizing video dialtone nonregulated services. To the contrary, we conclude that existing Part 64 rules do not require modification to prevent such an outcome.

180. The Joint Cost rules set forth in Part 64 were formulated to accommodate new enhanced services offerings in an increasingly competitive telecommunications environment. Part 64, for the most part, does not prescribe cost categories or allocation factors.[341] Rather, each carrier selects, subject to public comment and Commission review, the cost pools and allocators it needs to identify the costs of all of its nonregulated activities. The Commission chose this approach because it believed that the mix of nonregulated activities and the organizational structure would vary widely from carrier to carrier, and that a single, prescribed manual could not adequately encompass the possible variations.[342] No party has shown that video dialtone-related nonregulated products and services will exhibit, initially, less variety than other nonregulated activities, or will be more amenable to uniform treatment. Similarly, parties that object to the aggregation of video dialtone-related nonregulated costs with the costs of other nonregulated activities fail to explain what valid regulatory purpose of this Commission would be served by revisiting our determination in the Joint Cost Order to avoid product-specific cost allocations to nonregulated products and services.[343] We therefore decline to promulgate video dialtone-specific cost allocation rules for nonregulated activities related to video dialtone service at this time.[344] However, we may require uniformity

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340 World Institute Jt. Pet. Comments at 7.

341 The Commission has, after extensive experience with individual carrier practices, established uniform cost pools for some accounts. See Implementation of Further Cost Allocation Uniformity, 8 FCC Rcd 4664 (Com. Car. Bur. 1993).

342 Joint Cost Order, 2 FCC Rcd at 1352 n.225.

343 See Joint Cost Order, 2 FCC Rcd at 1317, paras. 147-48, 151. See also 47 C.F.R. §64.903.

344 Arguments in favor of establishing separate subsidiary requirements for video dialtone-related enhanced services are addressed at paragraph 232, infra.

should be addressed either by the Joint Board established in CC Docket 80-286 or as part of a comprehensive Part 36 and 69 reform proceeding.[356] These parties differ on whether video dialtone services should be authorized prior to the resolution of the separations issues.[357]

185. On the other hand, several commenters oppose the establishment of a Joint Board to address video dialtone separations issues.[358] They deny that there is a jurisdictional mismatch of video dialtone costs and revenues, arguing that the Commission could order assignment of joint facilities based on an appropriate measure of relative use or rely on existing rules, which require the cost of wideband services to be "directly assigned where feasible."[359] Parties also oppose the establishment of a Joint Board because it will slow the implementation of video dialtone; because it is premature; and because these issues would be better addressed in the context of a comprehensive review of jurisdictional separations and access charges, or within the comprehensive review of video dialtone in 1995.[360] PacTel maintains that the Commission should continue to require detailed information as part of the video dialtone Section 214 authorization to help promulgate a comprehensive review of Part 36.[361]

Discussion

186. We decline the parties' requests that we institute at this time Federal-State Joint Board proceedings to amend our Part 36 jurisdictional separations rules for video dialtone service. For the time being, LECs will allocate regulated video dialtone investment and expenses between the state and federal jurisdictions in accordance with existing rules. To ensure that our decisions do not have untoward effects outside of our regulatory jurisdiction, we are directing the Common Carrier Bureau to monitor the impact of

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356 See, e.g., AT&T Jt. Pet. Comments at 7; BellSouth Jt. Pet. Comments at 3, 6-7, 13.

357 See, e.g., Broadband Jt. Pet. Reply Comments at 5-6; NASUCA Jt. Pet. Comments at 2-3.

358 See, e.g., NTCA Jt. Pet. Comments at 2; PacTel Jt. Pet. Comments at 6; SNET Jt. Pet. Comments at 7-8.

359 See, e.g., SNET Jt. Pet. Comments at 7; Bell Atlantic Jt. Pet. Comments at 8; NYNEX Jt. Pet. Comments at 12-13.

360 See, e.g., PacTel Jt. Pet. Reply Comments at 6; NTCA Jt. Pet. Comments at 2-4; SNET Jt. Pet. Comments at 7-8.

361 PacTel Jt. Pet. Reply Comments at 6.

video dialtone on separations results and on intrastate local telephone rates, and to report its findings periodically to this Commission. This course of action will provide us and state regulators with the practical experience and the data necessary to make appropriate decisions concerning the future of the Part 36 rules.

187. Joint Petitioners and others have complained that existing separations rules would assign to the states 75% of increased loop costs attributable to video dialtone, but no video dialtone revenues. As explained in Sec. IV(A)(3) of the instant order, however, we have on further consideration determined that regulated video dialtone services of a purely intrastate nature may be tariffed in the intrastate jurisdiction. The availability of intrastate video dialtone revenues should help offset any increase in intrastate costs caused by LEC provision of video dialtone services and help prevent any local rate increases.

188. In declining to institute a Joint Board proceeding to address issues raised by the particular video dialtone proposals now pending before the Commission, we do not mean to imply that we will never revisit Part 36. Indeed, it appears likely that, as telecommunications networks and the marketplace evolve, the separations rules will require revision. In our judgment, however, it is too soon to begin proceedings to propose specific rule changes in this area. Video dialtone is but the first of what we expect to be an array of broadband services, and the current video dialtone proposals may or may not be representative of the manner in which those services will use network facilities, or of the jurisdictional mix of those services. Under these circumstances, scarce federal and state regulatory resources should not be expended to craft separations rules tailored to video dialtone.

189. We will take the following steps to help ensure that local telephone ratepayers are not being harmed by the advent of video dialtone -- a preeminent concern of state commenters. We direct the Common Carrier Bureau to develop a data collection program that will track the impact of video dialtone on both separations results and intrastate telephone rates. As part of this program, the Bureau will require all carriers offering video dialtone to submit detailed explanations of how they are applying the Part 36 rules, as well as Parts 32, 61, and 64, to video dialtone investments and expenses. The Bureau will report its results periodically so that this Commission and state regulators can determine when and if rule changes or other actions appear necessary.

190. We also will open an inquiry proceeding focusing on a matter of paramount concern to both federal and state regulators--the implications for the jurisdictional separations process of the introduction of new technologies, including broadband technology, into local exchange carrier networks. This proceeding will provide

a forum for exploring the broader separations policy issues raised by continuing changes in network technology, of which video dialtone is but one example. The inquiry also will be a vehicle for updating, in light of actual video dialtone experience, the record created in the instant proceeding. We strongly encourage active state commission involvement in our inquiry and seek to establish a dialogue between state and federal regulators on these issues. The information we gather in this inquiry could serve as a basis for future rulemaking proposals as we examine our existing rules in light of the evolving nature of LEC networks.

191. State commissions, of course, bear the primary responsibility for ensuring that intrastate rates are reasonable. We emphasize that neither our decisions in this proceeding nor our actions on the various video dialtone Sec. 214 applications preempt the state commissions from disallowing from local telephone service rates any video dialtone-related costs that do not meet their own standards for inclusion in rates.

192. Finally, some parties contend that Section 410(c) of the Communications Act legally compels us to refer all separations issues, including use of common plant for video dialtone, to a Joint Board. Although Section 410(c) requires the Commission to refer separations issues to a Joint Board upon instituting a notice and comment rulemaking proceeding, we are not proposing to modify any separations rules here but are simply applying our existing rules. We conclude that we have the authority to apply existing jurisdictional separations rules during the initial phase of video dialtone service deployment. Our initial determinations regarding implementation of existing jurisdictional separations to video dialtone are, of course, subject to revision as we gain further experience with video dialtone.

e. Part 69 -- Access Charge-Cost Allocations and Rate Structure

Pleadings

193. Several petitioners and the Joint Petition request that the Commission determine the proper application of its access charge rules to video dialtone.[362] The Joint Petition states that a separate access charge category for video dialtone is needed so that video dialtone costs are not subsumed in access services provided to interexchange carriers.[363]

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362 See, e.g., DCPSC Petition at 5-6; Joint Petition at 10, 17, Hatfield Study at 24-25.

363 Joint Petition at 18; see also AT&T Jt. Petition Comments at 9-10; CompuServe Jt. Pet. Reply Comments at 5.

194. On the other hand, many LECs oppose changing Part 69 at this time.[364] For example, NYNEX asserts that video dialtone costs would not be subsumed in the access services provided to interexchange carriers because as a directly assigned interstate private line (wideband) service, the video dialtone costs would be assessed against end users of video and information providers.[365] SNET argues that the access charge regulations should not be changed to require video dialtone elements due to the wide variety of possible video dialtone systems and the lack of a video dialtone rate plan.[366] NTCA asserts that a piecemeal approach to access charge review will ignore universal service goals and deprive rural customers of the benefits of the information age.[367]

Discussion

195. We conclude that access to the basic video dialtone platform is a form of interstate access to the extent it is used to route interstate video programming to end users. We also conclude that a separate access charge category for video dialtone may be desirable to help ensure that interstate video dialtone costs are not recovered through charges for access services provided to interexchange carriers.

196. We decline, however, to prescribe a new rate element or to initiate a notice of proposed rulemaking at this time. We recognize that the access charge rules define rate elements established for traditional telephone facilities. Video dialtone may use both new and existing network facilities to deliver services in ways not contemplated at the time the Part 69 rules were written. Because video dialtone is a nascent service, though, and in light of the wide variety of possible video dialtone architectures LECs may employ, we find that there is a significant risk that any uniform rate structure we would prescribe now would fail to produce rate elements that logically match each carrier's video dialtone offering.

197. Instead, as the Commission has done in the past with other new services, we will require local telephone companies that wish to offer video dialtone services to file petitions for waiver of our Part 69 rules prior to the establishment of a permanent

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364 See, e.g., BellSouth Jt. Pet. Comments at 7, 10, 13-14; GTE Jt. Pet. Comments at 6; NYNEX Jt. Pet. Comments at 14-15.

365 NYNEX Jt. Pet. Comments at 14-15.

366 SNET Jt. Pet. Comments at 11.

367 NTCA Jt. Pet. Comments at 3-4.

video dialtone rate structure.[368] The waiver process, as an interim solution, will afford all interested parties an opportunity to participate, and challenge or support the rate structure proposed by the local telephone company. The waiver process will also provide a forum for reviewing the cost allocation proposals of ROR and optional incentive plan carriers.

198. We thus reject the contention that video dialtone is a special access service for which no Part 69 waiver would be required. NYNEX apparently has argued to treat video dialtone as special access because carriers will use dedicated facilities to offer these services.[369] Video dialtone, however, may share some characteristics with both switched and special access. While some video dialtone services will be offered over dedicated facilities, other video dialtone services may be offered over a joint transmission facility, an essential characteristic of switched access. Therefore, because Part 69 does not require assignment of this service to a particular service category, and because we believe the review of switched access waivers will best protect interstate ratepayers, we will treat video dialtone as a switched access service.[370]

199. We view this treatment of video dialtone service as a realistic and workable approach for the near term. Long term, it is our intention that these and other access charge reform issues

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368 See, e.g., Provision of Access for 800 Service, 4 FCC Rcd 2824, 2833, para. 74 (1989) (carriers were permitted to receive Part 69 waivers to establish separate unbundled subelements for 800 data base access and vertical features prior to the establishment of a permanent rate structure); Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, 6 FCC Rcd 6095, 6098, paras. 20-21 (1991) (carriers were permitted to receive Part 69 waivers to offer Line Identification Database (LIDB) service prior to the establishment of a permanent rate structure).

369 NYNEX Jt. Pet. Comments at 14-15. In a separate proceeding, Bell Atlantic also has characterized its video dialtone service as a special access service. See Bell Atlantic's ONA Plan Filing Comments at 3-4 (filed April 7, 1994).

370 To date only one video dialtone tariff has become effective. See Rochester Telephone Corp., DA 94-734 (Tar. Div. released June 30, 1994). That tariff is for a video dialtone trial of very limited scope and duration. See Rochester Telephone Corp., 9 FCC Rcd 2285 (Dom. Fac. Div. 1994).

will be addressed in future proceedings that address our Part 69 rules.[371]

f. Part 61 -- Price Cap Treatment

Pleadings

200. Several parties request that the Commission establish a separate price cap basket for video dialtone services.[372] The Joint Petition argues that using existing baskets invites cross-subsidization by giving carriers the flexibility to reduce charges for video dialtone below costs and recover the shortfall by raising rates for other regulated services.[373] The Joint Petition also argues that basket-by-basket earnings calculations and sharing should be required to prevent upward rate adjustments in other baskets.[374] AT&T asserts that, by aligning costs with the cost-causing services, the Commission will increase the likelihood of fair competition between LECs and other broadband service providers.[375]

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371 Several petitions are before the Commission seeking waivers of, or major changes in, the access charge rules. See, e.g., Rochester Telephone Corporation's Petition for Waiver, DA 93-687 (filed May 20, 1993); Ameritech Operating Companies, BellSouth Telecommunications, Inc., and Southwestern Bell Telephone Company Petitions for Waiver of Part 69 Access Rules, DA 93-707 (filed June 11, 1993); National Association of Regulatory Utility Commissioners' Petition for Notice of Inquiry Addressing Access Issues, DA 93-847 (filed June 25, 1993); NYNEX's Petition for Waiver of Parts 61 and 69, DA 93-1537 (filed December 15, 1993); see also Federal Perspectives on Access Charge Reform, FCC Staff Analysis (April 30, 1993).

We agree with NTCA that universal service issues should not be ignored, and we are aware that the addition of broadband loop facilities may have an immediate impact on the Universal Service Fund. Issues relating to the Universal Service Fund are currently under consideration by the Commission. See Amendment of Part 36 of The Commission's Rules and Establishment of a Joint Board, Notice of Inquiry, CC Docket No. 80-286 (August 30, 1994).

372 See, e.g., Joint Petition at 10, 17-18, Hatfield Study at 24-27; AT&T Jt. Pet. Comments at 9-10.

373 Joint Petition at 18; see CompuServe Jt. Pet. Reply Comments at 5; AT&T Jt. Pet. Comments at 9-10.

374 Joint Petition, Hatfield Study at 27.

375 AT&T Jt. Pet. Comments at 9-10.

201. In addition, FCTA and several other parties argue that video dialtone services should be treated as a "new service" subject to price cap regulation.[376] Moreover, FCTA and others contend that the Commission should strengthen its tariff review process for video dialtone service.[377] They contend that the Commission should establish a formal LEC tariff plan with express requirements for cost calculations and revenue projections in order to ensure the proper pricing of video dialtone service.[378] For example, ETI argues that cost support terms must be more clearly defined and that carriers should file additional cost support for their video transport services.[379] FCTA requests that the FCC clarify that LECs, whether operating under price caps or not, must submit their interstate video transport tariffs to a tariff review process that includes review for cross-subsidy, cost allocation, and separations issues.[380]

202. The LECs argue that current price cap rules will adequately prevent LEC abuses.[381] BellSouth asserts that video dialtone service is just another transport service and will fit comfortably into existing price cap baskets depending on how the service is offered.[382] Bell Atlantic argues that the existing price cap rules already include a separate service category for video services in the special access basket.[383] Similarly, several LECs oppose basket-by-basket earnings calculations and sharing. They argue that no new evidence has been presented since the Commission

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376 See, e.g., FCTA Petition at 6; NJCTA Jt. Pet. Comments at 9, 12-13 & n.22; GTE Comments at 7.

377 See, e.g., FCTA Petition at 3-7, 11-12, ETI Study at 1 (attached to the FCTA Petition); PaOCA Comments at 10; CompuServe Jt. Pet. Reply Comments at 5.

378 See, e.g., CompuServe Jt. Pet. Reply Comments at 5; NJCTA Jt. Pet. Comments at 2.

379 ETI Study at 4-10.

380 FCTA Petition at 3-7, 11-12; see PaOCA Comments at 10.

381 See, e.g., GTE Jt. Pet. Comments at 5-6; NYNEX Jt. Pet. Comments at 14-15; Bell Atlantic Jt. Pet. Comments at 6-7.

382 BellSouth Jt. Pet. Comments at 14.

383 Bell Atlantic Jt. Pet. Comments at 7.

last rejected this proposition and held that sharing would apply on an overall interstate basis.[384]

203. US West maintains that, because local telephone companies do not have market power in the provision of video services to the home, they cannot control prices, and thus, price regulation is unnecessary.[385] Assuming the Commission treats video dialtone as a competitive service, then US West contends that video dialtone could not have an impact on the prices of any other US West service subject to price cap regulation.[386] In addition, BellSouth asserts that the Commission can remove incentives to cross-subsidization by adopting a pure price cap regulatory structure as it has done with cable companies and AT&T.[387]

204. Further, several LECs argue that the existing tariffing process adequately protects consumers. They argue that the current tariff review process requires carriers to justify their costs before they offer video dialtone service and that the process is designed to ensure that consumers benefit from reasonable rates while protecting against predatory pricing of competitive services.[388] GTE opposes altering the tariff review process and states that tariff review plans are not usually established for individual service filings. GTE also states that not all LECs are required to submit interstate video services tariffs to the tariff review plan.[389]

Discussion

205. We conclude that price cap local telephone companies should continue to be subject to the existing price cap rules for their provision of video dialtone services. Contrary to US West's argument that local telephone companies are nondominant in the video marketplace, carriers offering video dialtone service maintain control over an essential bottleneck facility, i.e., the basic platform, and consequently retain control over the price of access to that platform. Until actual facilities-based competition

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384 See, e.g., Ameritech Jt. Pet. Comments at 9-10; BellSouth Jt. Pet. Comments at 10.

385 US West Jt. Pet. Comments at 4-6.

386 US West Jt. Pet. Comments at 10.

387 BellSouth Jt. Pet. Comments at 13-14.

388 See, e.g., Bell Atlantic Jt. Pet. Comments at 6-7; NYNEX Jt. Pet. Comments at 14-15; GTE Jt. Pet. Comments at 5-6.

389 GTE Reply Comments at 2 n.5.

gives video service providers access to several outlets for the distribution of their services, regulation of the common carrier platform is necessary to ensure that rates charged for access to the basic platform are just and reasonable.

206. We also conclude that video dialtone service is a "new service" under our price cap rules. New services are services that "add to the range of options already available to customers."[390] In contrast to restructured services, which involve the rearrangement of existing services, video dialtone adds to the range of options for customers because multiple video programmers will have access to a basic common carrier platform for the first time. Video dialtone thus differs from a carrier's provision of channel service or other video transport services.

207. Local telephone companies will be required to make a cost-based showing under the price caps new services test to establish initial video dialtone prices. As explained below, this test, as applied in established tariff review processes, provides an adequate vehicle for full consideration of the reasonableness of proposed video dialtone rates. We therefore find it unnecessary to initiate a rulemaking to develop new, video dialtone-specific tariffing requirements. We also conclude that, given our current dearth of experience with video dialtone tariffs, it would be both premature and counterproductive to attempt to promulgate such rules at this time. The first few tariff proceedings will provide a far more concrete and realistic factual context for future decision making than would be developed in a general rulemaking proceeding.

208. Some parties to this proceeding have requested clarification of the manner in which the price caps new services test will allow for review of cross-subsidy and cost allocation issues. We therefore review below the development and application of the new services test.

209. Evolution of the LEC Price Caps New Services Test. When a price cap carrier introduces a new service, the proposed rate must be reviewed, and historical demand established, before the service can be incorporated into the price cap formulas. When the Commission adopted price caps for AT&T, it established a requirement that new price cap service tariffs be filed on 45 days notice, with supporting information sufficient to demonstrate compliance with a "net revenue test" as a floor. New services were to be included in the first annual price cap tariff filing after

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390 Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6824-25, para. 314 (1990), recon., 6 FCC Rcd 2637 (1991), aff'd, National Rural Telecom Assoc. v. FCC, 988 F.2d 174 (1993).

the completion of the base year in which the new service becomes effective.[391]

210. The net revenue test required a showing that the service would increase net revenues for price capped services within a relatively short period of time. This test, originally developed for use in reviewing AT&T's optional calling plan rates,[392] provided assurance that the service would cover its incremental costs, and that the rate was, therefore, not predatory.[393] The Commission explained the reasons for using such a test for new, competitive services as follows:

> In the Optional Calling Plan Order, we found that fully distributed costing was not necessary to prevent cross-subsidization of a new, competitive optional calling plan by less competitive switched services. We recognized that a price lower than FDC, but higher than marginal cost, would not only recover the costs caused by the service, but contribute to overhead as well. We further found that, while FDC would definitively rule out predation, it would do so at an unwarranted cost. Depending on the degree and nature of competition, FDC would either preclude offering of the new service altogether, or erect an inefficient price umbrella over less efficient competitors. Based on these conclusions, we decided that an FDC standard should not be used as a means of determining the reasonableness of rates for new optional MTS calling plans. *We concluded that we should use a standard that more closely approximates marginal or incremental cost. Because marginal costs are essentially theoretical, however, and cannot be generated through conventional accounting methods, we decided to employ a net revenue test as a proxy for a marginal cost standard.*
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> We now conclude that the same considerations that led us to reject FDC as a standard for optional calling plans apply to all new AT&T services under price caps. *Consumer welfare will be increased by the introduction of a new service if that service produces revenues that*

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391 Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3123-4, para. 520 (1989) (AT&T Price Cap Order).

392 See Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, 59 R.R. 2d 70 (1985) (Optional Calling Plan Order.)

393 AT&T Price Cap Order, 4 FCC Rcd at 3128, para. 531.

> *cover at least the incremental costs of providing the service.*[394]

211. The AT&T price cap plan thus placed an incremental cost floor under new service prices, but relied on competition to provide the ceiling. Initially, the Commission chose this same approach for the price cap LECs.[395] On reconsideration, however, the Commission determined that a regulatory price ceiling also was required to protect LEC ratepayers against unreasonably high rates.[396] On an interim basis, the Commission directed LECs to support new service filings with traditional fully distributed cost showings, which the Commission described as follows:

> LECs that have introduced new service offerings in the past have provided cost support identifying the direct costs of the new service as well as the associated overheads. LECs typically submit engineering studies, time and wage studies, or other cost accounting studies in support of the new offering. The purpose of these studies is to identify the direct costs of providing the new service, absent overheads. Once direct costs are identified, the LECs add overhead costs in order to determine the overall cost of the new service.[397]

The Commission continued to use the net revenue test floor as a safeguard against predatory pricing.[398] It deferred adoption of final LEC new services rules to the then-pending Part 69/ONA proceeding.[399]

212. In the Part 69/ONA Order the Commission kept the net revenue test as a price floor but replaced the traditional FDC price ceiling with a more flexible cost-based test. The new test retained the "direct cost" component of the traditional approach but afforded the LECs greater leeway in the application of overhead loadings:

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394 Id. at 3124, paras. 521-2 (*emphasis added*).

395 LEC Price Cap Order, 5 FCC Rcd at 6825, paras. 319-21.

396 See LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2694-5, paras 126-129.

397 Id. at 2695, para. 128

398 Id. para. 127.

399 See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, 4 FCC Rcd 3983 (1989).

> Under our approach, a LEC introducing new services will be required to submit its engineering cost studies, time and wage studies, or other cost accounting studies to identify the direct costs of providing the new service, absent overheads, and must also satisfy the net revenue test. LECs may develop their own costing methodologies, but they must use the same costing methodology for all related services. ... Once the direct costs have been identified, LECs will add an appropriate level of overhead costs to derive the overall price of the new service. To provide the flexibility needed to achieve efficient pricing, we are not mandating uniform loading, but BOCS will be expected to justify the loading methodology they select as well as any deviations from it.[400]

213. On reconsideration, the Commission eliminated the net revenue test for LECs on the grounds that the cost showings necessary to demonstrate compliance with the price ceiling would also provide sufficient data to establish a price floor:

> As discussed earlier, the net revenue test was initially incorporated into the LEC price cap new services test as a way to ensure that LECs do not engage in predatory pricing. The subsequent requirement that LECs submit cost support for new services, including direct costs and overhead loadings, however, rendered the net revenue test superfluous as a check on predatory pricing. Once a LEC is required to submit information on direct costs, the requirements that price exceed direct costs will prevent predatory pricing.[401]

The Commission's substantive standard for determining whether new service rates are unreasonably low was not changed: a price is unreasonably low if it is predatory; a predatory price is one that does not recover the incremental costs of providing a service. Conversely, a rate that recovers all of the incremental costs of a new service is not predatory.

214. Application of the LEC Price Cap New Services Test. We decline at this time to amend the new services test specifically for video dialtone services. The Commission currently has

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400 Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 at 4531 (1991). LECs were also permitted to seek a higher rate of return, or "risk premium", for new services that they deem especially risky. Id.

401 7 FCC Rcd at 5237.

generally applicable rules in place that specify the cost support that must be submitted with any new service tariff, including a video dialtone tariff. Pursuant to these rules, carriers must submit engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of video dialtone. LECs have proposed a number of different network architectures for video dialtone, and there are wide variations in the manner in which, and the degree to which, LECs are proposing to integrate their video dialtone systems with their telephone networks. This diversity and experimentation, which we view as beneficial to the development of a modern telecommunications infrastructure, precludes us from adopting a one-size-fits-all rule for the identification of video dialtone direct costs. The tariff review process, which includes the possibility of tariff investigations under Section 204(a), will allow close examination of each LEC proposal and enable us to require such cost information as may be necessary to evaluate each proposal.[402] If the application of our existing rules has unintended consequences, or if the process reveals systematic problems, we will revisit our determination to rely on existing procedures.

215. We conclude, however, that it is important that we provide more specific guidance regarding the identification of direct costs in video dialtone tariffs than is ordinarily given. Local exchange carriers may, over time, make large investments to upgrade their networks for video dialtone and other broadband services. The large amounts of investment involved, and the serious concerns about cross-subsidization expressed in the record of the instant proceeding, suggest that video dialtone rates will be subject to intense scrutiny. We conclude that the video dialtone tariff review process will proceed more smoothly, and LECs and interested parties will be able to participate more constructively, if they better understand our expectations in advance of tariff filings.

216. Because video dialtone is an essential component of a multichannel video service that will compete directly with cable television operators and other multichannel video programming providers, LECs may have an incentive to understate the direct costs of the service in order to set unreasonably low prices and engage in cross-subsidization.[403] Therefore, as explained below, we

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402 We do not intend, as suggested by FCTA, to subject all video transport service offerings to rules set forth in this decision. Such action is beyond the scope of this proceeding.

403 See, e.g., Designing Safeguards Against Cross-Subsidization in Video Dialtone Services by Leland L. Johnson, ex parte submission dated October 3, 1994, on behalf of Adelphia Communications Corporation, et al.

will require the LECs to submit with their video dialtone tariffs a more detailed and complete identification of direct costs than we have generally required in other new services filings.[404]

217. Under our established practice, direct costs include the costs and cost components associated with the primary plant investment that is used to provide the service.[405] In the case of video dialtone, some of these plant costs will be incremental costs associated with plant dedicated to video dialtone service. The direct costs of video dialtone will also include any incremental costs that are associated with shared plant used to provide video dialtone and other services, that is, costs of shared plant that are caused by the carrier's decision to offer video dialtone service. In reviewing video dialtone tariffs, we will scrutinize the basis on which those costs are identified and included in the proposed charges for video dialtone service. We recognize and accept the challenges inherent in determining which costs are truly the consequences of a carrier's decision to provide video dialtone service, i.e., are incremental costs.

218. Moreover, we expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services. We will scrutinize the basis on which those costs are identified and included in the proposed charges. A LEC allocating an extremely low proportion of these other costs of shared plant to video dialtone will be expected to provide a strong justification for that approach, and we do not anticipate accepting a 0% allocation of the common costs of shared plant as reasonable.

219. Ordinarily carriers decide, in the first instance, whether to include in their direct cost studies any categories of costs (investment and expenses) in addition to primary plant. For video dialtone, however, we direct carriers to treat costs in other accounts as direct costs if those costs are reasonably identifiable as incremental costs of video dialtone service.

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404 We do not rule out the possibility that video dialtone tariffs would propose unreasonably high rates. The complete identification of direct costs that we require herein, combined with the existing requirement that LECs justify their overhead loadings, will allow us to determine the price ceiling.

405 Primary plant investment is investment recorded in central office equipment, information origination/termination equipment, and cable and wire facilities accounts. The cost components associated with these primary plant accounts include gross investments, depreciation reserves and expenses, various taxes and deferred taxes, return on investment, and plant-specific operations expenses. See generally Part 32 of the Commission's Rules.

Examples of accounts that might include reasonably identifiable incremental costs of video dialtone are those to which carriers book costs associated with land, buildings, network administration, testing, engineering, plant operations administration, product management, sales, advertising, customer services, and legal.

220. For purposes of the new services test, all costs not treated as direct costs are classified as overheads. Carriers bear the burden of justifying why their overhead loadings do not produce a final rate that is unreasonably high. As with shared plant, we will also require a strong justification for allocation of extremely low overheads to video dialtone service, and would not anticipate accepting a 0% allocation of overhead as reasonable. At the same time, we emphasize that we are not seeking to saddle video dialtone with an unreasonable proportion of overheads and other common costs. We hope and expect that video dialtone will be a successful service in the marketplace, and therefore contribute to the recovery of common costs. We recognize that imposing excessive cost burdens on video dialtone could diminish demand and possibly overall revenues and thereby thwart these objectives. Accordingly, the effects of price changes on video dialtone demand should be given due consideration in determining what constitutes a reasonable allocation of common costs and overheads. In this regard, we will scrutinize the basis for claims and projections of demand elasticities submitted in support of proposed video dialtone rates. And, of course, our rules will provide interested parties ample opportunity to comment on these claims and projections.

221. In implementing this specific guidance, we direct the Chief, Common Carrier Bureau, to ensure that video dialtone carriers file all the information necessary for purposes of evaluating the costs of providing video dialtone service and the reasonableness of the proposed cost allocations and overhead loadings. We further direct the Chief, Common Carrier Bureau, to consider whether the Bureau should adopt specific minimum requirements, including the possible use of standardized formats, for the supporting documentation that video dialtone providers must furnish with their proposed tariffs. We note that the Bureau previously has adopted such requirements in connection with the LECs' annual access tariff filings, as well as tariffs filed to provide specific services, such as Open Network Architecture (ONA) and Expanded Interconnection services. The goal of any such requirements would be to make the review of video dialtone tariffs by the Bureau and interested members of the public more expeditious and less costly.[406] In addition to making the tariff review process

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406 We do not intend that any such requirements should delay our consideration of video dialtone tariffs. LECs with Section 214 authorizations for video dialtone systems need not delay filing their proposed tariffs.

more accessible to interested parties, the establishment of minimum standard format and information requirements would facilitate their ability to participate in a meaningful way.

222. We agree with the Joint Petition that video dialtone service does not fit into existing price caps baskets given its unique characteristic of transmitting the video services of multiple program providers to end users on a common carrier basis.[407] We tentatively conclude that a separate price cap basket for video dialtone would help prevent improper cross-subsidization by preventing local telephone companies from offsetting a price reduction for video dialtone service with an increase in rates for other regulated interstate services. However, it is not necessary to establish this basket now, on an interim basis. Because no tariffs for permanent video dialtone service have yet been filed, it is unlikely that any such tariff will go into effect prior to January 1, 1995. July 1, 1996 is thus the earliest date on which a video dialtone service could be included in a price cap index. We therefore will seek comment on establishing a separate price cap basket for video dialtone service in a supplemental notice in the LEC Price Cap Performance Review.[408]

223. At this time we will not address the merits of whether basket-by-basket earnings calculation should be required. We recognize that investment in video dialtone facilities may generate costs that will have an impact on sharing. Issues regarding sharing, however, are being examined in the LEC Price Cap Performance Review. In the near term, we will continue to determine sharing and lower end adjustments on an overall interstate basis.[409]

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407 Bell Atlantic's argument that video dialtone should be placed in the special access basket has been rendered moot by the recent restructuring of LEC price cap baskets. See Transport Rate Structure and Pricing, Second Report and Order, 9 FCC Rcd 615 (1994).

408 See Price Cap Performance Review, supra note 312. That Review has sought comment more broadly on what changes we should make to price cap regulation as competition to LEC services develops. In particular, the Commission has invited parties to suggest proposals that could form the basis for the development of a plan for revising the baseline price cap model to facilitate the transition to more streamlined regulation for specific services that are subject to increased competition.

409 We also deny requests to establish a pure price cap system for video dialtone at this time. This issue will be addressed along with other proposed changes to the LEC price cap plan in the Price Cap Performance Review.

3. Two-Level Regulatory Framework and Application of Other Enhanced Service Safeguards

Background

224. In the Second Report and Order, the Commission concluded that a two-level regulatory framework for LEC provision of video dialtone services would best serve the public interest. Under this framework, the first-level platform consists of basic, regulated video delivery services, which must be provided on a nondiscriminatory, common carrier basis. The second-level of services consists of enrichments to the basic service, including enhanced and other nonregulated services. The Commission held that existing safeguards should apply to LEC provision of enhanced and other nonregulated services on the second level. These safeguards include accounting and cost allocation rules to separate enhanced and other nonregulated service costs from regulated service costs, as well as network disclosure rules to ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment.[410] In addition, the Commission held that the BOCs must adhere to ONA requirements and other safeguards adopted in the BOC Safeguards Order, including rules governing the use of CPNI.[411] In addition to CPNI requirements discussed in the next section of this Order, these other safeguards include: (1) nondiscrimination reporting requirements to ensure that BOCs and GTE do not discriminate in the quality, installation, and maintenance, of basic services provided to certain enhanced service providers; and (2) network disclosure rules, which ensure that BOCs and GTE do not favor certain enhanced service providers by allowing them unique access to information about network changes that could affect their interconnection of

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410 The network disclosure requirements of the "all carrier rule" apply to all LECs. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order, 84 FCC 2d 50, 82, para. 95 (1980); Computer & Business Equip. Mfrs. Ass'n, Report and Order, 93 FCC 2d 1226, 1229, para. 7 (1983); see also 47 C.F.R. § 68.110(1993).

411 7 FCC Rcd at 5823-24, para. 93. GTE is now also required to comply with the Commission's ONA rules. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket 92-256, FCC 94-58, 59 Fed. Reg. 26756 (released May 24, 1994) (GTE/ONA Order).

enhanced services to the network.[412] The Commission stated that it would consider imposing additional safeguards, tailored to specific video dialtone proposals, in the Section 214 certification process, if necessary. It also stated that, as part of its overall review of its video dialtone rules and policies, originally scheduled for 1995, it would review its video dialtone safeguards in order to assess their continuing effectiveness in light of the evolution of video dialtone technology and services.[413]

Pleadings

225. SWBT seeks reconsideration of the decision to establish a two-level regulatory structure for video dialtone services and to apply enhanced services safeguards to LEC provision of second-tier services.[414] SWBT argues that, because video dialtone is "not much more than a concept whose architecture is still on the drawing board[,]" it is premature for the Commission to dictate a two-tier or any other type of regulatory structure for video dialtone. It argues that cable companies are not subject to a similar construct, and that it is therefore unfair to impose it on video dialtone systems.

226. SWBT argues, further, that the Commission should not have imposed enhanced services safeguards on LEC provision of video dialtone services. It argues that, unlike the enhanced services market, "the video entertainment market is populated by entrenched providers who already have virtually unlimited access to most U.S. homes."[415] In contrast, it claims, LECs lack even a toehold in this market.

227. Compuserve, Prodigy, and IIA oppose SWBT's requests for reconsideration of the two-level structure. Compuserve argues that a strict division between level one and level two services is necessary to protect nonregulated enhanced service providers from common carrier regulation.[416] Prodigy asserts that if the Commission eliminated the dichotomy between basic and enhanced services, LECs would be able to deny competing enhanced service providers access

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412 See BOC Safeguards Order, 6 FCC Rcd at 7601-5, paras. 65-74. These network disclosure obligations are in addition to the obligations imposed by the "all-carrier" rule.

413 7 FCC Rcd at 5023-24, para. 96.

414 SWBT Petition at 12-13.

415 Id.

416 Compuserve Comments at 8.

to basic video dialtone services or stifle competition by bundling enhanced service offerings with basic offerings.[417]

228. Several parties also oppose SWBT's request that BOCs be relieved from the obligation to adhere to the nonstructural safeguards established in the BOC Safeguards Order.[418] Prodigy argues that SWBT's claim that LECs lack market power in the video marketplace is irrelevant given the LECs' monopoly power in the adjacent local exchange market and the inevitable overlap of video and other information services. Compuserve notes that video dialtone includes not only video programming, but videotext and other information services that are already subject to ONA requirements.

229. Some parties argue that existing nonstructural safeguards do not provide enough protection. For example, CFA/CME assert that given LEC incentives for cross-subsidization and discrimination, their history of abuse in these areas, and the inadequacy of Commission resources to police LEC abuses, the Commission should adopt more stringent safeguards, including, at a minimum, separate subsidiary requirements for all LEC nonregulated activities.[419]

Discussion

230. We now affirm our decision in the Second Report and Order to adopt a two-level regulatory framework for video dialtone services and to require BOCs and GTE to comply with our existing enhanced services safeguards. In adopting a two-level regulatory framework, we noted that this dichotomy tracks our existing regulatory framework for LEC basic and enhanced services.[420] We do not think the public interest would be well-served by adopting a different set of rules for video dialtone services, particularly given that LECs will provide both video and non-video offerings through these systems. Moreover, the two-level framework should promote competition and broaden consumer choice. The level-one common carrier platform will enable multiple video service providers, for the first time, to obtain access on a nondiscriminatory basis to the basic network functions that will allow such service providers to distribute their services to

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417 Prodigy Comments at 1-2.

418 See, e.g., Compuserve Comments at 5-6; Prodigy Comments at 2-3; IIA Comments at 3; NCTA Reply Comments at 6 n.15.

419 CFA/CME Petition at 24-32. See also, Prodigy Comments at 2; Compuserve Comments at 6-7.

420 7 FCC Rcd at 5811, para. 58.

consumers. Requiring LECs to offer nonregulated services subject to existing safeguards for the provision of such services will help ensure that LECs are not able to compete unfairly with other enhanced service providers and that LECs cannot bundle enhanced and nonregulated services with basic services in order to impede competition. SWBT has offered no basis for us to alter these conclusions. Even though video dialtone is still evolving, that should not preclude us from establishing a basic regulatory framework to govern it. In fact, application of the current regulatory framework until the evolution of video dialtone clearly requires a different framework is the most straightforward course of action under these circumstances. The fact that cable operators are subject to a different regulatory structure does not convince us otherwise, especially given that cable operators are governed by a different statutory regime than LECs.

231. We also affirm the Commission's decision to apply existing enhanced service safeguards to BOC and GTE provision of nonregulated level-two video dialtone services. No party offers any new evidence or argument that would persuade us that this decision should be revised. The fact that video dialtone is a new service does not lessen the possibility of discrimination, particularly since the BOCs and GTE may well use their video dialtone systems for video and non-video services and in light of their continuing market power in non-video services. Thus, absent the safeguards we have prescribed, we believe that there is an unacceptable risk that the BOCs and GTE could use their control over underlying video transmission facilities to obtain advantages in the provision of video-related enhanced and nonregulated services.

232. We also reject arguments that we should adopt more stringent requirements at this time, such as requiring LECs to offer all level-two services through a separate subsidiary. Here again, commenters have raised no new issues or arguments. We have found that separate subsidiary requirements for enhanced services impose inefficiencies and other costs, and that discrimination and cross-subsidization can be policed adequately through less onerous means.[421] No party has shown that provision of video-related enhanced services, which at this time do not include video programming itself, is so fundamentally different from provision of other enhanced services as to require a different regulatory regime. We do, however, make one minor change to our nonstructural safeguards. Currently, the BOCs and GTE must file nondiscrimination reports on their installation and maintenance of

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421 See BOC Safeguards Order, 6 FCC Rcd at 7575-76, paras. 8-9.

49 categories of basic services.[422] To adapt this requirement to video dialtone, we require the BOCs and GTE to add an additional service category for video dialtone delivery service.[423] We note that the United States Court of Appeals for the Ninth Circuit recently vacated in part and remanded the BOC Safeguards Order, on the ground that the Commission had not adequately explained how, without full unbundling of BOC networks under ONA, discrimination could be prevented in the absence of structural safeguards.[424] We delegate to the Common Carrier Bureau authority to establish interim measures to govern BOC provision of enhanced services, including video dialtone-related enhanced services, if and when this decision becomes effective.

233. Finally, in the Second Report and Order, we stated that we would review our video dialtone rules and policies in 1995. Such review no longer appears to be necessary in light of the detailed examination we have undertaken in this Order of those rules and policies, as well as our continuing work on major video dialtone issues through the CPNI data request[425] and the Third Further Notice.[426] Indeed, we are concerned that the regulatory uncertainty that could stem from another comprehensive review of video dialtone rules and policies could discourage video dialtone deployment pending that review. For these reasons, we will not initiate a formal review of our video dialtone rules and policies in 1995. Nevertheless, we will continue to monitor the evolution of video dialtone and oversee its implementation in specific

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422 Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3096, Appendix B (1990) (BOC ONA Reconsideration Order), 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), Erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 7646 (1991), 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied MCI Telecommunications Corp. v. FCC, 4 F.3d 1505 (9th Cir. Sept. 23, 1993). GTE must also comply with these reporting requirements, subsequent to filing an ONA plan. See GTE/ONA Order, supra note 411.

423 See BOC ONA Reconsideration Order, 5 FCC Rcd at 3096 Appendix B.

424 California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12767-8, 12775 (9th Cir. October 18, 1994).

425 See infra paras. 243-44.

426 See Third Further Notice, infra paras. 268-285. The Commission is also addressing issues of electronic redlining raised by two petitions filed on May 23, 1994. See supra note 22.

applications through the Section 214 process and the tariff review process. In addition, if in the future it becomes apparent that we should modify aspects of our video dialtone rules and policies, we will initiate a proceeding to do so.

4. Joint Marketing and Customer Proprietary Network Information

Background

234. As noted, in the Second Report and Order, the Commission concluded that existing nonstructural safeguards, adopted in the BOC Safeguards Order should apply to the provision of video dialtone by the BOCs. In so concluding, the Commission reaffirmed its holding in the BOC Safeguards Order that significant public interest benefits accrue from the efficiencies and innovations that can be obtained by permitting some integration of basic and enhanced services, including the integrated or joint marketing of these services by a LEC.[427]

235. Included among the Commission's existing nonstructural safeguards are CPNI requirements.[428] Under these requirements, the BOCs and GTE must limit access of their enhanced services marketing personnel to CPNI if a customer requests,[429] except that for customers with more than twenty access lines, the BOCs and GTE must obtain prior customer authorization before gaining access to CPNI.[430]

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427 Second Report and Order, 7 FCC Rcd at 5827, para. 89; BOC Safeguards Order, 6 FCC Rcd at 7617-21, paras. 100-104.

428 CPNI is "all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services." CPNI includes billing information, usage data, calling patterns, traffic studies, and forwarded-to-numbers, but does not include credit information. Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1, 215 (1988), recon., BOC ONA Reconsideration Order, supra note 422.

429 BOC Safeguards Order, 6 FCC Rcd at 7605, para. 75.

430 Id. at 7612. The Commission found that BOCs would be effectively precluded from joint marketing to small customers if prior authorization of CPNI use was required for such customers, thus depriving the customers of "one-stop shopping" opportunity. It also found that a customer with more than 20 lines is more likely to be aware of enhanced services options, even absent BOC joint marketing. Finally, the Commission stated that large customer CPNI is more valuable to competing enhanced service providers than small customer CPNI in the telephone context. Id.

In addition, the BOCs and GTE must make CPNI available to enhanced service providers (ESPs) designated by a customer, and must notify multiline customers of the option to so designate an ESP.[431] They must also make available to ESPs nonproprietary, aggregated CPNI on the same terms and conditions on which they make such CPNI available to their own enhanced services personnel, and must notify ESPs of the availability of such information.[432]

Pleadings

236. PaPUC and the Joint Petitioners urge us to adopt limits on the joint marketing of basic telephony and video dialtone service, and on the use of CPNI that a LEC may obtain as a video dialtone provider.[433] They argue that the Commission incorrectly concluded that existing CPNI and joint marketing requirements for LEC-provided CPE and enhanced services adequately address competitive and privacy concerns in the video dialtone context, and that joint marketing of video dialtone and telephone service by a LEC customer service representative would enable the telephone company to obtain an unfair advantage over competing providers of video facilities or services.[434] The Joint Petitioners add that the LEC advantage would be particularly pronounced in dealing with new residents who typically seek telephone service immediately.[435] They note that in the context of CPE the Commission has previously required BOCs who engage in joint marketing to inform customers of the availability of alternative sources of equipment.[436] PaPUC argues that the existing CPNI rules will not ameliorate the LEC advantage derived from joint marketing of telephone and video dialtone service because the existing rules require BOC personnel to obtain prior approval before using CPNI only for customers with more than twenty access lines, and video dialtone customers will generally be single line customers.[437] The Joint Petitioners further contend that application of existing CPNI rules to video dialtone

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at 7610-12.

431 Id. at 7605.

432 Id.

433 PaPUC Petition at 9-10; Joint Petition at 20.

434 PaPUC Petition at 9-10; Joint Petition at 20-21.

435 Id. at 21.

436 Id.

437 PaPUC Petition at 2, 9-10. See also Compuserve Jt. Pet. Comments at 5-6.

would not provide video dialtone customers with sufficient privacy.[438] In particular, they argue, LECs "should not be permitted to gather television viewing patterns and market the information on individual subscribers to customer-programmers."[439]

237. Two parties support the Joint Petition view regarding joint marketing and CPNI.[440] Compuserve urges the Commission to revise the CPNI rules to require all providers of enhanced services, including video dialtone services, to obtain prior written consent of basic telephone customers before using customers' CPNI.[441] It argues that this requirement would ensure competitive equity and customer privacy.[442] World Institute states that it has no objection to the Commission conditioning particular Section 214 applications on certain privacy requirements.[443]

238. Several LECs oppose the Joint Petition, stating that existing joint marketing and customer privacy rules are sufficient to protect consumers if LECs also offer video dialtone service.[444] They maintain that the Commission has already decided not to treat enhanced video services differently from other enhanced services for purposes of joint marketing and CPNI, and that the Joint Petition offers insufficient basis for different treatment.[445] Bell Atlantic agrees with the Commission's finding in the Second Report and Order that joint marketing of basic and enhanced services can provide public interest benefits through greater efficiencies and innovations.[446] NYNEX contends that CPNI rules protect customers' right to privacy, including residence and small business

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438 Joint Petition at 22.

439 Id.

440 See Indiana/Michigan Jt. Pet. Comments at 2-3; Compuserve Jt. Pet. Reply Comments at 5-6.

441 Compuserve Jt. Pet. Reply Comments at 5-6.

442 Id.

443 World Institute Jt. Pet. Comments at 7 (citing 47 U.S.C. § 551).

444 See, e.g., SNET Jt. Pet. Comments at 13; Ameritech Jt. Pet. Comments at 11-12; NYNEX Jt. Pet. Comments at 16-17; Bell Atlantic Jt. Pet. Comments at 9-10.

445 Ameritech Jt. Pet. Comments at 11-12; BellSouth Jt. Pet. Comments at 7-8. See also PacTel Jt. Pet. Comments at 4.

446 Bell Atlantic Jt. Pet. Comments at 9-10.

subscribers, because LECs do not release CPNI to non-affiliated vendors without customer authorization.[447] SNET notes that a video dialtone platform must be offered on a nondiscriminatory basis and therefore has no particular advantage over other video facilities or services.[448] NYNEX argues that the advantage in joint marketing belongs not to the local telephone companies, but to the cable companies with an entrenched customer base and monopoly power in video services.[449]

Discussion

239. We affirm our decision to permit LECs to engage in joint marketing of basic and enhanced video dialtone services, as well as of basic video and nonvideo services.[450] We also affirm our decision to apply existing CPNI rules to video dialtone at this time. Nevertheless, we direct the BOCs and GTE, the carriers to which our CPNI rules currently apply, to provide us with additional information about the kinds of CPNI to which they will have access as a result of providing video dialtone service so that we may obtain a better record in assessing whether existing CPNI rules best balance the various interests that are implicated by the use of CPNI in the video dialtone context.

240. We permit LECs to engage in joint marketing of basic and enhanced video services, and of basic video and nonvideo services, because we believe that the benefits of permitting joint marketing outweigh any adverse effect on competition. We have discussed these benefits at length in the context of nonvideo services.[451] We have noted, for example, that joint marketing allows LECs to provide basic and enhanced services more efficiently and to combine basic and enhanced services to provide customers with one-stop shopping for services tailored to their individual needs.[452] We have also noted that permitting LECs to engage in joint marketing of basic and enhanced telephone services can help to increase customers' knowledge about such services, thereby expanding the

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447 NYNEX Jt. Pet. Comments at 17.

448 SNET Jt. Pet. Comments at 13.

449 NYNEX Jt. Pet. Comments at 16-17.

450 Thus, for example, LEC personnel may market video dialtone service and telephony services at the same time. Likewise, they may jointly market basic video dialtone transmission service and a video gateway or other enhanced service.

451 BOC Safeguards Order, 6 FCC Rcd at 7609-10, para. 85.

452 Id.

market for such services, to the benefit not only of LEC enhanced services providers, but other providers as well.

241. These same benefits apply in the video dialtone context. Joint marketing can offer consumers the convenience of one-stop shopping both for basic telephone and video dialtone services and for basic and enhanced video dialtone services. Through joint marketing, LECs will be able to increase customer awareness not only of the video dialtone system generally, but of enhanced features and functions available on that system. This awareness will benefit programmer-customers as well as end users and result in greater usage of the video dialtone platform. At the same time, LECs will be able to market video dialtone services in the most efficient manner possible, avoiding the costs imposed by structural separation.

242. The record in this proceeding does not support a finding that joint marketing of video and telephony services will have an anticompetitive impact on the provision of video programming services to end users. While consumers moving to a new residence typically arrange for telephone service prior to or immediately after the move, they also will be arranging for other services at that time, including video programming services. No one has shown that the first call placed is necessarily to the telephone company. More significantly, the cable operator, not the telephone company, will be the incumbent video programming provider in the market. We believe that consumers today are likely to be aware that they may order video programming services from the local cable operator. We also believe that they will do so if the cable operator's rates and programming are preferable to those offered by programmers on the video dialtone network. Simply because telephone companies may sometimes have an initial contact with consumers changing residences in our view does not demonstrate a likely anticompetitive effect or warrant a prohibition on joint marketing. We also note that the extent to which LECs will market basic video dialtone service to end users is unclear, particularly since in some video dialtone applications, LECs have proposed to charge their programmer-customers, but not end users, for basic video dialtone service.[453] Moreover, since telephone companies, as common carriers, are prohibited from favoring a particular video programmer's product, the ability of LECs to market video dialtone services to consumers will be constrained in any event. By contrast, cable companies with authorization to provide telephone

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453 See, e.g., New Jersey Bell, File No. W-P-C 6838, Rochester Telephone, File No. W-P-C 6867, and Pacific Bell File No. W-P-C 6913.

service can jointly market video and telephony services without restrictions on favoring particular video programmers.[454]

243. We also apply to video dialtone, at this time, our existing CPNI rules, which were recently upheld by the United States Court of Appeals for the Ninth Circuit.[455] We do not now establish special CPNI rules for video dialtone because the record provides an inadequate factual basis for doing so. Specifically, no party has provided evidence that existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the video dialtone context.[456] Nevertheless, because of the significant privacy issues that are potentially implicated by video dialtone-related CPNI, we believe we should obtain additional information about such CPNI so that we may carefully assess whether existing CPNI rules sufficiently protect customer privacy in the video dialtone context.[457] For example, we seek information as to whether LECs, in providing video dialtone, will have access to information about the types of

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454 We are aware that many cable companies are still prohibited by state laws or regulations from providing telephone service. As noted, we strongly support removal of these restrictions. See also supra note 66.

455 California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12770, 12775 (9th Cir. October 18, 1994).

456 CPNI/joint marketing rules reflect a balance between competing policy goals of: (a) protecting customers' privacy interests against disclosure of their CPNI by BOC or GTE personnel; (b) increasing customer access to enhanced services by permitting BOC and GTE personnel to market telephone service and enhanced services at the same time, and to use CPNI to assist in identifying customer interests and needs; and (c) preventing BOC or GTE-affiliated ESPs from gaining a competitive advantage over independent ESPs by virtue of having information they can use to market enhanced services to the customer.

457 We note that we are currently reviewing our existing CPNI rules for enhanced services in another proceeding. Specifically, on March 10, 1994, we issued a public notice seeking comment on whether existing CPNI rules remain appropriate in light of recent alliances, mergers and acquisitions between LECs and non-telephone company entities. In that notice, we asked inter alia, whether our CPNI rules should apply to all LECs. Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, 9 FCC Rcd 1685 (1994). Arguments, such as Compuserve's, that we should tighten our CPNI rules for all enhanced services are properly raised in the context of that proceeding.

programming that each customer views. This information would raise greater privacy concerns than other CPNI, which does not generally include information about the content of customer communications. We are also interested in assessing the competitive value of CPNI obtained from video dialtone, as well as the extent to which access to this information promotes the efficient provision of regulated and nonregulated services by LECs.

244. In order to obtain a better record for addressing these issues, we direct each of the BOCs and GTE to file, within ninety days of publication of a summary of this Order in the Federal Register, a detailed description of the types of CPNI to which it anticipates having access as a provider of video dialtone service. We also direct each to explain how it would plan to use such information in marketing video dialtone services to video programmers or consumers. Other interested parties, including, but not limited to, independent LECs, may also file at that time any information responsive to these issues. After this information is filed, we will issue a public notice establishing a supplemental pleading cycle that will give all interested parties the opportunity to comment. Based on this record, we will then reassess whether the public interest would be served by modifying existing CPNI rules for video dialtone service and propose any changes in those rules that may be warranted.

C. OTHER ISSUES

1. Preferential Access to Video Dialtone

Background

245. In the Second Report and Order, the Commission declined to require LECs to set aside capacity at reduced or no charge for certain classes of video programmers or to impose upon LECs federal public, educational and governmental (PEG) access requirements.[458] The Commission concluded that "[u]nlike other video distribution regulatory schemes, the bedrock common carrier nature of video dialtone . . . will require unfettered access for all program providers, regardless of their nature and, in this way, will directly promote the goals access rules have historically been designed to meet."[459] The Commission determined that if the marketplace does not meet the needs of certain groups, such as public television broadcasters, it would be preferable to address

458 Second Report and Order, 7 FCC Rcd at 5805, para. 44.

459 Id.

those needs directly through specific governmental appropriations.[460]

Pleadings

246. Several petitioners seek reconsideration of the Commission's decision not to prescribe preferential access for noncommercial and other nonprofit programmers.[461] They argue that this decision is contrary to Congressional mandates and longstanding Commission policy and will likely deny the American public meaningful access to noncommercial and other nonprofit programming on the video dialtone network.[462]

247. APTS/CPB and CFA/CME assert that, beginning with the enactment of the Public Broadcasting Act of 1967, Congress has indicated its intent that nonprofit telecommunications services be made available to the widest possible audience, regardless of the technology employed to transmit that programming. Even after the Commission's decision in this proceeding, they claim, Congress reiterated this mandate -- in both the Public Telecommunications Act of 1992 and the 1992 Cable Act.[463] They argue, further, that the

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460 Id. at 5805, para. 44 n.103.

461 See CFA/CME Petition at 33-36; APTS/CPB Petition at 1-22. See also CLG Opposition at 10-11. In addition, INTV seeks preferential rates for broadcast licensees and NAB seeks preferential rates for video dialtone services that are primarily local in nature. See infra paras. 251-2.

462 CFA/CME Petition at 33-35 and APTS/CPB Petition at 4-17. See also CLG Opposition at 10-11; The National Trust for the Development of African-American Men ex parte letter, June 15, 1994; and People for the American Way ex parte letter, June 20, 1994.

463 See APTS/CPB Petition at 4-10; CFA/CME Petition at 33-36. They cite, in particular, the "must carry" provisions of the 1992 Cable Act and provisions requiring reservation of capacity and preferential rates for public telecommunications services on direct broadcast satellite technology. In addition, they cite the Public Telecommunications Act of 1992, which added Section 396(a)(9) to the Communications Act, providing: "it is in the public interest for the Federal government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies . . ." APTS/CPB Petition at 4. APTS/CPB also quotes at length the legislative history of that Act in support of its claim that Congress intended that support of public telecommunications programming be provided over new technologies. Id. at 5.

Commission also has recognized the importance of ensuring universal access to such programming and the need to take special measures to do so.[464] According to APTS/CPB, the Commission provided neither a reasoned basis nor record support for this departure from longstanding policy, and the Commission's decision is therefore arbitrary and capricious.[465]

248. APTS/CPB and CFA/CME also dispute the Commission's assertion that preferential treatment for certain classes of program providers is inconsistent with the common carrier nature of video dialtone. Citing the Commission's Lifeline and Linkup America programs, they assert that the Commission has already implemented special preferences for certain groups in the context of a common carrier model.[466] They argue that preferential treatment is not unlawful or inconsistent with common carrier regulation unless that treatment is unjust and unreasonable.[467] They claim that preferential treatment of noncommercial programming would be fully justified, as Congress and the Commission have repeatedly recognized that the marketplace will not support the production or distribution of this programming and that governmental action is necessary to ensure its availability.

249. According to APTS/CPB, if public broadcasters are required to pay marketplace rates for video dialtone, they either will be unable to participate in video dialtone, or they will be limited to providing programming that will generate sufficient revenues to cover costs.[468] In either case, it claims, public television would be unable to fulfill its mission of providing high quality educational programming and a voice for underserved pockets of the American public.[469]

250. CFA/CME criticizes the Commission for relegating to Congress or state legislatures the question of financial aid to programmers.[470] It argues that because of the enormous editorial power that attends government funding, a reliance on government

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464 See APTS/CPB Petition at 10-12; CFA/CME Comments at 19-20.

465 APTS/CPB Petition at 17-22.

466 See APTS/CPB Petition at 23; CFA/CME Petition at 33-34.

467 Id. See also INTV Petition at 5, discussed infra at para. 246 (making the same argument in the context of broadcast television).

468 APTS/CPB Petition at 15.

469 Id.

470 CFA/CME Petition at 33.

appropriations could actually impede the Commission's goal of true diversity. It argues that, the likely result of the Commission's decision is to restrict consumer choice to commercial programmers and, possibly, a handful of governmentally selected noncommercial programmers.[471] CLG likewise asserts that the Commission's decision is inconsistent with the goal of fostering diverse programming.[472]

251. NAB asks us to establish reduced access rates for services that are primarily local in nature. NAB argues that such a policy would make the most-needed services more affordable to more consumers. In addition, it argues, because these services are the most popular, reduced rates could stimulate use of video dialtone, resulting in faster deployment of the service.[473]

252. Association of Independent Television Stations, Inc. (INTV) maintains that the Commission's decision threatens the future of free, over-the-air broadcast television.[474] Citing data in an FCC staff report, it notes that advertising revenues for broadcast stations have fallen by about four percent per year in real terms since 1987. It argues that, unless the Commission alleviates the cost burden faced by broadcast programmers, such programmers may be unable to continue providing free over-the-air television, or they may be forced to reduce news and other non-entertainment programming.[475]

253. NCTA and US West oppose the petitions for reconsideration.[476] They argue that preferential rates for certain classes of programmers would be inconsistent with the Commission's determination that video dialtone must be offered on a common carrier basis.[477] NCTA argues further that allowing or requiring LECs to offer different terms and conditions to particular programmers would be inconsistent with the cable-telco cross-ownership ban. It states that such a policy would accord LECs precisely the kind of editorial discretion and control over

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471 Id. at 35. See also CFA/CME Comments at 19.

472 CLG Comments at 10-11.

473 NAB Petition at 3; 12-13 and NAB Comments at 18-19.

474 INTV Petition at 3-7.

475 Id. at 4-7.

476 NCTA Petition at 5; NCTA Comments at 10-11; US West Comments at 5.

477 US West Comments at 5; NCTA Petition at 5-7; NCTA Comments at 10-11; NCTA Reply Comments at 6-7.

packaging that is at the heart of cable service.[478] On the other hand, Bell Atlantic argues that the Commission should clarify that LECs are allowed to establish different rates as they choose, but are not required to follow pre-determined rate restrictions.[479]

Discussion

254. In the Second Report and Order, we decided not to mandate preferential treatment for certain classes of video programmers largely because we concluded that mandatory preferential treatment is generally inconsistent with a Title II common carrier regime, the cornerstone of which is the provision of service to the public on the basis of rates, terms, and conditions that are not unreasonably discriminatory. We still have concerns about this issue. A system of discounts or free access for certain video programmers could also introduce economic distortions that would restrict demand for video dialtone service.[480] For these and other legal and policy reasons, mandating preferential rates for any specific class of programmer may not be compatible with the public interest. On the other hand, however, the continued availability of diverse sources of programming clearly serves the public interest.

255. As parties note, we have recognized exceptions to the general principle of nondiscrimination in the provision of common carrier services. These exceptions have been based upon a compelling showing of need and strong public policy concerns.[481] Based on our review of the record, we conclude that we do not currently have a sound basis for determining whether a similar exception should be made here, and if so, for which programmers, and to what extent. In the Third Further Notice, we seek comment on these issues. We also seek comment on whether a proposal by Bell Atlantic that seeks to permit LECs voluntarily to provide

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478 NCTA Reply Comments at 6-7; NCTA Comments at 10-11.

479 Bell Atlantic Comments at 8 n.26.

480 If the Commission required LECs to subsidize video dialtone service for certain video programmers, they would presumably have to raise rates for other programmer-customers. These prices, if sufficiently high, could suppress video dialtone demand, thereby unnecessarily impeding the development of video dialtone systems.

481 Specifically, the LifeLine and Link Up America programs cited by these parties were designed to ensure that low-income Americans can obtain basic telephone service. These programs are thus part of our long-standing commitment to the promotion of universal service.

preferential rates to certain classes of programmers is or could be lawful.

2. Special Incentives

Background

256. In the Second Report and Order, the Commission declined to adopt or propose special incentives to accelerate deployment of the common carrier broadband network. The Commission found that the regulatory changes made in the Second Report and Order offered sufficient incentives to encourage LECs to invest in infrastructure and deploy advanced networks.[482] It stated that, in lieu of special incentives, it was preferable to remove regulatory barriers so that market forces would determine the success of advanced technologies.[483] The Commission also reasoned that special incentives could thwart the development of useful alternative technologies.

Pleadings

257. ACT and SNET contend that the Commission erred in deciding not to provide special incentives to carriers to encourage investment in advanced broadband infrastructure.[484] ACT argues that the Commission mistakenly concluded that market forces alone will encourage telephone company investment for the construction of advanced broadband networks. According to ACT, deployment of advanced infrastructure will be unnecessarily delayed because current depreciation schedules for existing copper plant are too low.[485] ACT asserts that, based on existing depreciation schedules, it could take as much as 40 years for LECs to depreciate fully their existing plant.[486] ACT also states that the Commission erroneously decided to rely on the three year review process for any changes to the price cap regime.[487]

258. ACT disputes the Commission's determination that it would be endorsing one technology over another by giving special

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482 Second Report and Order at 5835, para. 103.

483 Id.

484 ACT Petition at 4; SNET Comments at 2-3.

485 ACT Petition at 5.

486 Id.

487 Id. at ii, 6-7.

incentives to telephone companies that deploy advanced broadband facilities.[488] ACT argues that the Commission is not choosing the technology when it acts on a request for accelerating deployment of facilities.[489] According to ACT, the Commission ignores the "reality of the regulatory process" by maintaining that such would be tantamount to picking technology winners or engaging in industrial policy.[490]

259. On the other hand, NAB argues that video dialtone alone provides sufficient incentives to deploy advanced networks.[491] California Cable Television Association (CCTA) supports the Commission's decision to defer changes to existing depreciation procedures until it can assess the impact of market forces on advanced infrastructure deployment.[492] CCTA adds that any future changes to the depreciation review procedure, including whether any composite rates are appropriate, should only occur after formal notice and comment.[493]

Discussion

260. The petitioners have not presented any persuasive basis for the Commission to modify its decision in the Second Report and Order regarding special incentives. In particular, they have not persuaded us that our existing practices for prescribing depreciation rates pose an impediment to the deployment of new technologies. Under our existing rules, the Commission reviews the depreciation rates of each carrier on a three year rotating cycle. Carriers may also seek interim updates of their depreciation rates. Based on a review of a variety of service life indicators, the Commission establishes depreciation rates for each major category of plant designed to recover the carrier's investment over the plant's projected remaining life. In the case of telephone plant, based on the most recent (1993) depreciation represcription order, the average remaining life is 9 years and approximately 40 percent of the original cost of those facilities has already been taken as

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488 Id. at 8.

489 Id.

490 Id.

491 NAB Petition at 7.

492 CCTA Comments at 14.

493 Id. at 15.

depreciation expense.[494] We believe that our existing practices are adequate to respond to any acceleration in the rate of technological change in the provision of loop facilities.[495] We also note that to date we have received more than thirty video dialtone applications proposing use of advanced broadband networks. These applications provide evidence that the measures we have taken in this proceeding to eliminate artificial regulatory constraints will by themselves promote investment in broadband networks and that special incentives are unnecessary.

D. RECOMMENDATION TO CONGRESS

Background

261. In the Second Report and Order, the Commission recommended that Congress amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide video programming directly to subscribers in their telephone service areas. The Commission stated that if Congress repealed the ban, the Commission would require LECs to provide video programming services through a separate subsidiary, if it concluded that the benefits of structural separation exceeded the costs. In addition, the Commission stated that it would require LECs to provide video programming services through the basic video dialtone platform that provides service to multiple programmers. Finally, the Commission stated that it anticipated limiting LEC-provided video programming initially to a specified percentage of overall capacity. The Commission did not specify an exact capacity limitation, but noted that Congress was then considering a bill that would limit a LEC to 25% of the platform's capacity for carrying affiliated video programming and suggested that this might represent a "reasonable balance."[496]

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494 This average remaining life is based upon staff analysis of the theoretical depreciation study findings specified by the Commission. See generally The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for BellSouth Telecommunications, Inc., et al., 9 FCC Rcd 734 (1994).

495 Moreover, we note that the Commission has adopted simplified depreciation prescription processes for price cap LECs which afford those LECs a greater degree of flexibility in the depreciation prescription process. Simplification of the Depreciation Prescription Process, Second Report and Order, FCC 94-174 (released June 28, 1994); Report and Order, 8 FCC Rcd 8025 (1993). See also Simplification of the Depreciation Prescription Process, Further Order Inviting Comments, FCC 94-256 (released October 11, 1994).

496 7 FCC Rcd at 5850, paras. 143 n.360.

Pleadings

262. A few telephone companies, NAB, and OC/UCC seek reconsideration of some or all aspects of the Commission's recommendation to Congress. Ameritech and USTA object to the Commission's predisposition towards structural separation requirements for LEC-provided video programming. Ameritech argues that this presumption is at odds with the Commission's finding that the separate subsidiary requirement is no longer necessary to protect against LEC abuses in the area of enhanced services.[497] It asserts that the Commission has shown no reason why this conclusion should not apply equally to video programming as other enhanced services. USTA maintains that a separate subsidiary requirement could require construction of redundant networks -- one for video dialtone, and the other for provision of video programming directly to subscribers.[498]

263. SWBT objects to all of the proposed safeguards.[499] It asserts that limiting the amount of LEC-provided programming over video dialtone platforms violates LEC First Amendment rights and discourages LEC investment in video dialtone by increasing the potential that those facilities may never be efficiently utilized. It also argues that the proposed restrictions would be unfair, insofar as they apply only to LECs, and not to cable companies.

264. OC/UCC and NAB criticize the Commission's recommendation that the ban on LEC provision of video programming be removed.[500] OC/UCC contends that this recommendation cannot be reconciled with the Commission's stated concern for promoting diversity and competition in the provision of video services.[501] NAB maintains that, without the video programming prohibition, LECs would be able to purchase cable systems within their telephone service areas, and thereby substitute one monopoly for another.

Discussion

265. Although petitions for reconsideration do not lie against reports to Congress,[502] we nevertheless take this opportunity

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497 Ameritech Petition at 16.

498 USTA Comments at 16-17.

499 SWBT Petition at 13-16.

500 See OC/UCC Petition at 2-4; NAB Petition at 9-10.

501 OC/UCC Petition at 1-2.

502 See 47 U.S.C. § 405.

to affirm our recommendation that Congress amend the 1984 Cable Act to permit LECs to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards. As we noted in the Second Report and Order, the 1984 Cable Act's ban on LEC provision of video programming was originally enacted to prevent LECs from establishing a monopoly position in the provision of video services.[503] Given the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly. While there remains some risk of anticompetitive behavior by the LECs, we affirm our finding that this risk can and should instead be addressed through our video dialtone framework and other appropriate regulatory safeguards. Thus, contrary to OC/UCC's contention, our recommendation that the prohibition be lifted is not inconsistent with our concerns about LEC discrimination. Moreover, NAB's assertion that a lifting of the ban would contravene the public interest by enabling LECs to purchase cable companies in their service areas instead of deploying video dialtone assumes that regulatory safeguards would not address this issue.

266. We do not now address LEC arguments regarding the need for particular safeguards. We will address those arguments in the context of individual Section 214 applications or in any further rulemaking proceeding we may initiate to address the LEC provision of video programming directly to subscribers.

267. Just as we believe that the removal of barriers to full and fair competition in the video services market would serve the public interest, we also favor full and fair competition in the provision of telephony. We recognize that both the House of Representatives and a Committee of the Senate gave overwhelming approval to legislative proposals that included removal of barriers to local exchange competition as part of a comprehensive and balanced package of proposals. We share those legislators' goal of expanding competition in communications markets. Indeed, video dialtone is an important part in our efforts to accomplish this goal. We encourage Congress to remove barriers to the competitive provision of local telephone services to further this goal.

V. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

A. Capacity Issues

268. One of the key elements of the Commission's video dialtone policy is the requirement that LECs seeking to offer video dialtone service provide a common carrier platform containing sufficient capacity to serve multiple video programmers, and that

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503 7 FCC Rcd at 5848, para. 136.

the platform have the ability to expand as demand increases so as to avoid becoming a bottleneck.[504] As we noted, these requirements (as modified here) will ensure greater diversity of video programming and further our goal of fostering the deployment of an advanced telecommunications infrastructure. Nevertheless, it has become apparent through the Section 214 application process that there may be technical limits on the expandability of analog capacity in video dialtone systems. To the extent digital transmission facilities can be used instead to deliver the same programming, capacity constraints are substantially mitigated. The economic and technical viability of digital capacity in the short term, however, is unclear for two reasons. First, there is uncertainty about the widespread availability and commercial feasibility of digital compression and transmission equipment. Second, if digital capacity is used for video dialtone, end user subscribers must have a set-top converter to view the video signals on today's televisions. Currently, the cost of a set-top converter is approximately $300.[505]

269. In its Section 214 application, GTE has proposed a video dialtone system that would make extensive use of digital capacity. GTE proposes a platform with approximately 168 compressed digital channels, 80 analog channels, and 4 reverse analog channels.[506] Programmer-customers on GTE's platform would have the option of delivering to GTE an analog signal or a digital signal. If a programmer-customer delivered an analog video signal, GTE would either modulate this signal onto an analog channel, or encode and multiplex this signal input onto a digital bit stream.[507] The analog signal or digital bit stream would then be delivered over the video dialtone network. To access all channels and services offered on the platform, GTE's proposal requires end user subscribers to purchase or rent a set-top converter, both because the converter is needed to view compressed digital video signals on today's televisions and because some channels may be encrypted.[508]

270. We now seek comment on the merits of the GTE approach or some variation of it as a way of meeting our capacity and expandability goals. Parties commenting on this approach should address, in particular, the technical, economic, and operational

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504 Second Report and Order at 5797, paras. 29, 30.

505 See SWBT ex parte letter, June 1, 1994, at 5.

506 GTE Section 214 Application, File No. W-P-C-6955, at 6 (May 23, 1994).

507 Id.

508 Id. at 9.

feasibility of digital equipment and facilities. For example, we seek comment on whether digital compression and transmission equipment will be commercially available on a broad scale in the near future, and on the quality of compressed digital video. We also seek comment on the costs of digital equipment. Likewise, we seek comment on the cost of set-top converters and on whether and when, given these costs, we should require LECs to employ all-digital video dialtone systems. In addition, we seek comment on the impact of such an approach on low-income subscribers.

271. We also seek comment on methods or arrangements for promoting more efficient use of analog channel capacity. Most video dialtone applications filed thus far propose to offer between 60 and 80 analog channels of video programming. In order to make more efficient use of this analog capacity, and to comply with our rules, four LECs have proposed "channel sharing arrangements."[509] The stated purpose of these analog channel sharing mechanisms is to maximize use of analog capacity by avoiding carriage of the same video programming on more than one analog channel, thereby making video dialtone more attractive and available to multiple video programmers, and more marketable to consumers. Generally, channel sharing arrangements would make available to all programmer-customers subscribing to the basic platform the programming on shared individual channels or blocks of channels. In turn, the shared channels could be made part of the programmers' general service offering.

272. While the various channel sharing proposals each have unique characteristics, they also share several features. Most of the plans provide for 10 to 15 "common" channels.[510] Generally, no programmer-customer would be required to purchase the common channels, although most LECs believe that it will be in programmer-customers' interest to use this service. According to the LECs, the shared analog channels will most likely carry off-air broadcast signals because under current market conditions, those are the most

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509 See Ameritech Operating Companies Section 214 application at 6 (Jan. 31, 1994); Ameritech ex parte statement, May 9, 1994, at 10-11; Bell Atlantic Section 214 application at 14 (June 16, 1994); Pacific Bell Section 214 application at 17 (Dec. 20, 1993); U S WEST Communications, Inc. ex parte letter, May 16, 1994, regarding Section 214 applications at Charts 1 and 2.

510 Bell Atlantic's "will-carry" proposal would provide as many as 37 channels for local broadcast and PEG programming. Bell Atlantic telephone companies Section 214 Application, File No. W-P-C-6966 at 4 (June 16, 1994); Bell Atlantic ex parte letter, July 1, 1994, at 9-12. See also, Bell Atlantic Section 214 Application, File No. W-P-C 6914 (June 16, 1994). See Third Further Notice, infra para. 284.

popular channels with consumers. Indeed, Pacific Bell's proposal would limit the use of shared channels to local off-air signals. Likewise, Bell Atlantic proposes to provide free carriage for local broadcast stations and PEG programmers seeking access.

273. The management of the shared channels varies among the proposals. Ameritech and Pacific Bell are similar in that they propose that a manager or administrator determine the programming for the common channels and secure the programming rights for those channels. US West takes a different approach, proposing that the programmer-customers work together to select the programming. US West would provide a "facilitator" to assist the programmer-customers, but would not maintain any long term involvement with such facilitator. The programmer-customers would be responsible individually for obtaining rights to the programming on the common channels. On the other hand, Bell Atlantic's proposal is broadcast-programmer driven, with local broadcast stations and PEG programmers requesting carriage, which Bell Atlantic would provide at no charge to the broadcaster or PEG programmers.

274. We tentatively conclude that channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, programmer-customers, and video dialtone providers, while remaining consistent with the requirements of the cross-ownership provisions of the 1984 Cable Act. For example, these arrangements could increase the number of video programmers on the platform, thus creating diverse programming options. In addition, they would enable multiple video programmers to offer full service packages to consumers. Channel sharing arrangements would also maximize use of the platform by programmer-customers, thereby benefitting video dialtone providers.

275. At the same time, we recognize that, depending upon how they are structured, these arrangements can raise significant legal and policy issues. We therefore believe that the public interest would be well-served by the establishment of specific rules and policies to govern channel sharing arrangements. To this end, we now seek comment on the following issues: First, if channel sharing is permitted, who should structure or administer shared channels -- the LEC, a programmer-customer, a consortium of programmer-customers, or an independent third party? In this regard, we seek comment on the role that LECs may play in structuring or administering channel sharing arrangements without violating the cross-ownership provisions. If we conclude that video programmers should play a role in administering shared channel mechanisms, we propose to modify our rule prohibiting video programmers from jointly operating, with a LEC, a basic video dialtone platform. Second, what criteria should be used to select the shared channel administrator? Third, how should programming be selected for the shared channels? Fourth, we seek comment on the terms and conditions on which shared channels should be made available to programmer-customers. Finally, we seek comment on any

other relevant issue regarding channel sharing arrangements. We do not intend at this time to prescribe one kind of sharing arrangement, but to establish rules and policies that will ensure that any such arrangement will further the public interest and remain consistent with the 1984 Cable Act. Nor do we intend to defer consideration of Section 214 applications proposing channel sharing arrangements pending the development of rules and policies governing such arrangements. Rather, we will address those proposals on a case-by-case basis. Section 214 authorizations will, however, be conditioned on compliance with any subsequent rules that we adopt with respect to channel sharing mechanisms.

B. Modifications to our Prohibition on Acquisition of Cable Facilities

276. As discussed above, we have decided to retain our existing prohibition on the acquisition by telephone companies of cable facilities in their service area for provision of video dialtone. This ban, we believe, will further the public interest by promoting facilities-based competition for video services. Nevertheless, we have recognized that some markets may be incapable of supporting two video delivery systems. In these markets, our prohibition serves little useful purpose since facilities-based competition is not likely to develop or be sustainable in any event. Indeed, we are concerned that, in these markets, our prohibition would effectively preclude the establishment of video dialtone service, thereby denying consumers the benefits of a common carrier video transmission facility capable of serving multiple video programmers.

277. In light of these concerns, we now seek comment on appropriate modifications to our prohibition that would permit acquisitions of cable facilities in markets in which two wire-based multi-channel video delivery systems are not viable, while preserving the ban in other markets. Specifically, we seek comment on criteria that would permit us to identify those markets in which two wire-based multi-channel video delivery systems would likely not be viable.

278. We propose to amend our prohibition so that LECs would be permitted to purchase cable facilities in markets that meet these criteria. Alternatively, these criteria could serve as the basis for a presumption that a request for waiver of the prohibition would be granted. We tentatively conclude that LECs proposing to purchase cable facilities in their service area must identify the facilities to be purchased in their Section 214 application and demonstrate that the area served by those facilities meets the criteria we establish in this rulemaking. We seek comment on these proposals and on any other proposals parties might offer that would accomplish the same ends.

279. We also propose to amend our rules to permit LECs and cable operators jointly to construct a video dialtone system in those areas in which we permit LECs to acquire cable facilities for use in providing video dialtone. Permitting joint construction of video dialtone systems in such areas and shared costs of video dialtone might, in fact, encourage the deployment of advanced facilities in areas that otherwise might lack them. We seek comment on our proposal to permit joint construction of video dialtone systems in areas in which the acquisition ban is lifted.

C. Preferential Access Proposals

280. As discussed above, we have found that the record does not provide an adequate basis for deciding whether to mandate preferential video dialtone access or rates for certain classes of programmers, or whether to permit LECs voluntarily to provide preferential treatment to certain programmers. We now seek additional information and comment so that we may obtain a better factual basis for addressing these issues.

281. We seek comment, first, on whether we legally can, and should, mandate preferential video dialtone treatment for commercial broadcasters or for certain classes of PEG or not-for-profit video programmers. As noted above, we have authorized preferential treatment of certain classes of consumers when such treatment is justified by a compelling showing of need and public policy concerns. We invite parties to comment on whether there are public policy reasons to mandate preferential treatment for commercial broadcasters, or for certain types of PEG or not-for-profit programmers, such as, for example, noncommercial educational programmers. Parties addressing this issue should describe any such reasons with specificity, as well as the adequacy or inadequacy of alternative means of providing public support for such programmers, such as grants and direct subsidies. Parties should also address whether mandated preferences for certain types of programmers would be consistent with the First Amendment and the Supreme Court's decision in Turner v. FCC,[511] as well as with Title II of the Act, including Sections 201(b) and 202(a).[512]

282. We also invite parties to suggest a definition of the programmers they believe any such mandate should cover. Specifically, to the extent that any policy of preferential treatment would be based upon a finding of need, we seek comment on how such a policy could be fashioned to target not-for-profit video programmers most in need of preferential treatment. We also seek comment on appropriate affiliation rules that might be part of

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511 Turner Broadcasting System, Inc. v FCC, 114 S.Ct. 2445 (1994).

512 47 U.S.C. §§ 201(b), 202(a).

any such need-based test to ensure that video programmers that have certain affiliations with nonqualifying entities do not receive preferential treatment. In addition, we seek comment on whether preferential treatment should be available to any not-for-profit programmer meeting a means test or to only those programmers offering certain types of programming, such as educational programming. Parties should also address the First Amendment implications of any such classifications, as well as how such classifications would be administered. For example, parties should discuss whether a LEC role in determining eligibility of specific video programmers for preferential treatment would be consistent with the common carrier framework governing video dialtone, the cross-ownership provisions of the 1984 Cable Act, and relevant case law.

283. Finally, we seek comment on the type and amount of preference that should be mandated, in the event that we decide to prescribe preferential treatment for certain programmers. Parties should address, in particular, whether preferential access is necessary, or whether discounted rates alone would meet our public policy goals. Parties should also address how much of a preference should be granted. For example, parties advocating preferential rates should address how those rates should be calculated. We note that one possibility would be to base preferential rates on an incremental cost standard, whereby video programmers eligible for preferences would pay only for the incremental costs to the LEC of providing channel capacity to such programmers. We seek comment on this proposal and on any other proposal for implementing a preferential treatment policy.

284. We seek comment, second, on whether to permit LECs voluntarily to provide certain programmers with preferential treatment on LEC video dialtone platforms. For instance, in two of its video dialtone Section 214 applications, Bell Atlantic has proposed to reserve analog capacity for local broadcast stations, and PEG programmers, at no charge to these programmers.[513] We now seek comment on these "will carry" proposals. We also seek comment on whether we should permit LECs voluntarily to provide other forms of preferential treatment. For instance, should we permit LECs to offer preferential access or rates only to not-for-profit video programmers? Should we permit LECs to reserve capacity for local broadcast stations and PEG programmers at reduced rates? With respect to all proposals for voluntary LEC provision of preferential treatment, we seek comment on whether a permissive policy toward preferential access to video dialtone would be consistent with the First Amendment and the Supreme Court's decision in Turner v FCC. We also seek comment on whether these

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513 Bell Atlantic, File No. W-P-C 6966 (June 16, 1994) and Bell Atlantic, File No. W-P-C 6914 (June 16, 1994).

proposals would or could be consistent with Sections 201(b) and 202(a) of the Act, and, if so, under what circumstances. We invite comment as well on whether such proposals are consistent with the common carrier framework governing video dialtone, the 1984 Cable Act, and relevant case law, including NCTA v FCC. In addition, we seek comment, as we did above for mandatory preferential treatment, on all the issues entailed in identifying the categories of customers eligible for preferential treatment. Finally, we seek comment on whether these proposals, assuming they are lawful, would further the public interest.[514]

D. Pole Attachments and Conduit Rights

285. Section 63.57 of our rules requires LECs seeking to provide channel service to show in their Section 214 applications that the cable system for which the LECs would be providing channel service had available, within the limitations of technical feasibility, pole attachment rights or conduit space "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator."[515] The rule seeks to prevent LECs from denying cable systems reasonable access to their pole or conduit space for the purpose of preventing competition from these cable systems.[516] We now seek comment on whether a similar rule should apply to LECs providing video dialtone service. Commenting parties should address whether LECs have the incentive and ability to leverage their control over pole attachments or conduit rights to prevent facilities-based competition by video programmers to the LECs' video dialtone platforms. Advocates of a rule in this area should propose specific language, and should explain how the rule would prevent anticompetitive behavior.

VI. CONCLUSION

286. For the reasons stated above, we conclude that the Second Report and Order, as modified herein, will eliminate artificial barriers to competition and distorted investment incentives and disincentives. This, in turn, will promote the public interest goals we have identified throughout this proceeding: facilitating competition in the provision of video

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514 Comments filed by parties in this proceeding will be transferred to the record of the Third Further Notice we issue today.

515 47 C.F.R. §63.57(1993).

516 See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307, 311, 314, 326-7 (1970), modified on recon., 22 FCC 2d 746 (1970).

services, encouraging deployment of the national telecommunications infrastructure, and fostering the availability to the American public of new and diverse sources of video programming.

VII. EX PARTE PRESENTATIONS

287. The Third Further Notice of Proposed Rulemaking is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206.

VIII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

288. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Third Further Notice of Proposed Rulemaking is as follows:

289. Reason for Action: The Commission is issuing this Third Further Notice of Proposed Rulemaking to consider whether to require or permit LECs providing video dialtone to grant preferential access or rates to certain classes of video programmers.

290. Objectives: The objective of the Third Further Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

291. Legal basis: The Third Further Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 2, 4, 201-205, 215, 218, 220, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220 and 303(r); and 5 U.S.C. § 553.

292. Description, potential impact, and number of small entities affected: Amending our rules to require or permit LECs providing video dialtone to grant preferential access or rates to certain classes of video programmers may directly impact entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. Granting certain small video programmers preferential access to or rates on the video dialtone platform can have a positive impact on those entities by facilitating their provision of video programming to subscribers. On the other hand, preferential access or rates for certain small entities may negatively impact those small entities that do not receive preferential treatment. The Secretary shall send a copy of this Third Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in

accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 et seq. (1981).

293. Reporting, recordkeeping and other compliance requirement: None.

294. Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

295. Any significant alternatives minimizing impact on small entities and consistent with state objectives: The Third Further Notice solicits comments on whether or not to mandate or permit preferential access or rates, as well as the types and extent of preferential access or rates that might be required or permitted.

296. Comments are solicited: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Third Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq..

IX. COMMENT FILING DATES

297. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 16, 1994, and reply comments on or before January 17, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, ITS, Inc., Room 246, 1919 M Street, N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

X. ORDERING CLAUSES

298. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 214, and 220 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 151, 154, 201-205, 214, 220, 533, the MEMORANDUM

OPINION AND ORDER ON RECONSIDERATION, affirming in part, and modifying in part, the SECOND REPORT AND ORDER in this proceeding, IS ADOPTED, as provided herein, effective 30 days after publication of a summary in the Federal Register, except that paragraphs 232, 243 and 244 shall be effective 90 days after publication of a summary in the Federal Register.

299. IT IS FURTHER ORDERED that the Petition for Rulemaking filed by CFA and NCTA is DENIED IN PART and GRANTED IN PART to the extent indicated above.

300. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, a THIRD FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

301. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Third Further Notice of Proposed Rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Parties Filing Comments
Reconsideration of the Second Report and Order
and Recommendation to Congress

Petitions for Reconsideration

ACT and Henry Geller (ACT)
Ameritech Operating Companies (Ameritech)
Association of America's Public Television Stations and Corporation for Public Broadcasting (APTS/CPB)
Association of Independent Television Stations, Inc. (INTV)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth)
California and the Public Utility Commission of California (California)
Consumer Federation of America and Center for Media Education (CFA/CME)
District of Columbia Public Service Commission
Florida Cable Television Association (FCTA) (filed late)
GTE Service Corporation (GTE)
National Association of Broadcasters (NAB)
National Association of Regulatory Utility Commissioners (NARUC)
National Cable Television Association, Inc. (NCTA)
New York City (NYC)
New York State Department of Public Service (NYDPS)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Office of Communications of the United Church of Christ (OC/UCC)
Pacific Telesis Group, Pacific Bell and Nevada Bell (PacTel)
Pennsylvania Public Utility Commission (PaPUC)
Southwestern Bell Corporation (SWBT)
United Telephone Companies (UTC)
US WEST Communications, Inc. (US West)

Comments and Oppositions to Petitions

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth)
California Cable Television Association (CCTA)
Compuserve Incorporated (Compuserve)
Consumer Federation of America and Center for Media Education (CFA/CME)
Florida Cable Television Association (FCTA)
GTE Service Corporation (GTE)
Information Industry Association (IIA)
International Business Machines Corporation (IBM)
National Association of Broadcasters (NAB)
National Association of Telecommunications Officers and Advisors, the National League of Cities, the U.S. Conference of

Mayors, and the National Association of Counties (Coalition of Local Governments or CLG)
National Cable Television Association, Inc. (NCTA)
New England Cable Television Association (NECTA)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Pacific Telesis Group, Pacific Bell and Nevada Bell (PacTel)
Pennsylvania Office of Consumer Advocate (PaOCA) (filed late)
Prodigy Services Company (Prodigy)
Southern New England Telephone Company (SNET)
Southwestern Bell Corporation (SWBT)
United States Telephone Association (USTA)
US WEST Communications, Inc. (US West)

Replies to Oppositions

America's Public Television Stations and Corporation for Public Broadcasting (APTS/CPB)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
District of Columbia Public Service Commission (DCPSC)
GTE Service Corporation (GTE)
National Cable Television Association, Inc. (NCTA)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Pacific Telesis Group, Pacific Bell and Nevada Bell (PacTel)

Appendix B: Parties Filing Comments
CFA/NCTA Joint Petition for Rulemaking

Comments and Oppositions

American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Association of Independent Television Stations, Inc. (INTV)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
California and the Public Utilities Commission of the State of California (California)
California Cable Television Association (CCTA)
Citizens for a Sound Economy Foundation (CSEF)
District of Columbia Public Service Commission (DCPSC)
Edison Media Arts Consortium (Edison)
GTE Service Corporation (GTE)
Indiana Utility Regulatory Commission and the Michigan Public Service Commission (Indiana/Michigan)
National Association of Regulatory Utility Commissioners (NARUC)
National Association of State Utility Consumer Advocates (NASUCA)
National Telephone Cooperative Association (NTCA)
New Jersey Cable Television Association, Inc. (NJCTA)
NYNEX Telephone Companies (NYNEX)
Pacific Bell and Nevada Bell (PacTel)
Southern New England Telephone Company (SNET)
Telecommunications Industry Association (TIA)
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
World Institute on Disability, the Consumer Interest Research Institute, Henry Geller and Barbara O'Connor (World Institute)

Reply Comments

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth)
Broadband Technologies, Inc. (Broadband)
Consumer Federation of America and Center for Media Education (CFA/NCTA)
Compuserve Incorporated (Compuserve)
GTE Service Corporation (GTE)
New Jersey Board of Regulatory Commissioners (NJBRC)
New Jersey Cable Television Association (NJCTA)
New York Department of Public Service (NYDPS)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Telesis Group, Pacific Bell and Nevada Bell (PacTel)
R.G. Hale Consulting (Hale)
Telecommunications Industry Association (TIA)

United States Telephone Association (USTA)
US West Communications, Inc. (US West)

APPENDIX C: FINAL RULE CHANGES

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 63 is amended to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 201-205, 218, and 403 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. secs. 151, 154(i), 15(j), 201-205, 218, 403, and 533 unless otherwise noted.

2. Section 63.54 is amended to read as follows:

(a) [unchanged]

(b) [unchanged]

(c) [unchanged]

(d)(1) Except as provided in paragraph (d)(5) of this section, nothing in this section shall be construed to prohibit the provision of video dialtone services.

(2) Nothing in this section prohibits a telephone company from exceeding the carrier-user relationship with a video programmer or video programmers by providing services, and engaging in activities, not related to the provision of video programming directly to subscribers in its local exchange area.

(3) A telephone company may exceed the carrier-user relationship in its local exchange area with a video programmer by providing enhanced or other nonregulated services related to the provision of video programming to such video programmer, provided that a basic video platform is available to 70% of the households for which the video programmer seeks such enhanced or nonregulated services and provided that the telephone company does not:

(i) Determine how video programming is presented for sale to subscribers in its local exchange service area, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers in that area; or

(ii) Have a cognizable financial interest in, or exercise direct or indirect control over, any entity that performs any of the activities listed in paragraph (d)(3)(i) of this section within the telephone company's local exchange service area.

(4) A telephone company may exceed the carrier-user relationship with a video programmer or video programmers by

providing services, and engaging in activities, related to the provision of video programming (other than enhanced or other nonregulated services), provided that the telephone company does not:

(i) Determine how video programming is presented for sale to subscribers in its local exchange service area, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers in that area;

(ii) Have a cognizable financial interest in, or exercise direct or indirect control over, any entity that performs any of the activities listed in paragraph (d)(4)(i) of this section within the telephone company's local exchange service area;

(iii) Permit any video programmer to participate in the operation or management of basic video dialtone service, except as may be authorized by the Commission; or

(iv) Exceed the carrier-user relationship with any franchised cable operator in the telephone company's local exchange service area, or affiliate of such cable operator, except to: lease cable drop wires, in accordance with paragraph (d)(5) of this section, or to provide enhanced or other nonregulated services, in accordance with paragraph (d)(3) of this section.

(5) A telephone company may not acquire cable facilities in its local exchange service area for use in providing video dialtone service, or services related to the provision of video programming directly to subscribers. Notwithstanding the above, a telephone company may acquire cable facilities in its local exchange service area for use in providing common carrier channel service, subject to Section 214 certification and compliance with the Commission's rules. A telephone company may also lease drop wires from a franchised cable operator in its local exchange service area, provided that: (i) such lease is for a nonrenewable term of three years or less; and (ii) the telephone company does not obtain exclusive rights to use such drop wires, or otherwise unreasonably restrict the access of any video programmer to any of the cable operator's drop wires.

(e) In applying the provisions of this Section:

(1) [unchanged]

(2) [unchanged]

(3) [unchanged]

(4) [unchanged]

(5) Interests with rights of conversion to equity, including debt instruments, warrants, convertible debentures, and options, shall not be included in the determination of cognizable ownership interests unless and until conversion is effected.

(6) Attribution of ownership interests in a video programmer that are held indirectly by any party, other than an investment company, through one or more intervening entities, will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, and application of the relevant benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. (For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of a video programmer, then X's interest in the video programmer would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in the video programmer would be 2.5% (0.1 x 0.25)). Under the 5% attribution benchmark, X's interest in video programmer would be cognizable, while A's interest would not be cognizable. Paragraph (e)(2) of this section governs stock ownership interests held by an investment company in a corporation.

(f) Nothing in this section prohibits a telephone company from providing video programming directly to subscribers outside its telephone service area or from owning video programming that an unaffiliated video programmer directly provides to subscribers in the telephone company's service area.

(g) As used in this section, the term "video programmer" shall mean any entity that provides video programming either directly or indirectly through an affiliate, directly to subscribers. Any entity shall be deemed to "provide" video programming if it determines how video programming is presented for sale to subscribers, including making decisions concerning the bundling or "tiering," or the price, terms, or conditions on which video programming is offered to subscribers.

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: VIDEO DIALTONE RECONSIDERATION ORDER AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

The Commission's vote on video dialtone today is the culmination of our most painstaking consideration of the many complex legal, political, economic and technical issues that the construction of these advanced broadband communications systems presents. In the course of this deliberative process we have been required to address perhaps the most fundamental of telecommunications policy issues: what benefits will these systems bring, who will reap these benefits, short and long term, and who should pay for them. I am perfectly certain that not everyone will be perfectly satisfied that today's decision strikes the correct balances. So in my judgment the importance of what we do today calls for an explanation of why I, for one, am satisfied with these balances.

The issue of cost allocation has two dimensions: first, how to separate costs between the federal and state jurisdictions, and, second, how to apportion interstate costs between telephone ratepayers and the telephone company shareholders. On the federal-state separations issue, the question for me has never been one of whether the states should be involved in this cost apportionment process - for clearly they must be and they will be - but rather, how this involvement can most productively be realized. And in this regard, I am persuaded that the most productive way to provide a basis for federal and state regulators to make informed decisions is to first solicit the necessary data and other relevant information in a Notice of Inquiry. While the immediate convening of a federal-state joint board to review separations issues may have great facial appeal, the simple fact is, we do not yet have a body of data from which we believe any meaningful conclusions can be drawn at this time about the separations impact of building advanced telecommunications networks. Each of the pending video dialtone applications is, as our 1991 decision intended that they be, unique in certain material respects from all the others. Because of this, and given our limited experience in dealing with these applications to date, engaging the joint board process immediately would accomplish little of a concrete nature. Our Notice of Inquiry, on the other hand, is designed to compile precisely the kind of further information that could be meaningfully considered and evaluated by a joint board. For this reason, I support the Notice of Inquiry as a necessary predicate to convening a federal-state joint board to decide these issues.

On the issue of how interstate costs will be allocated between video dialtone and basic telephony, I do feel that the reconsideration item provides an approach that will allocate video dialtone costs in a fair and rational manner. Would changes to our generic cost allocation rules have accomplished

the same result? Yes. But the real question is, are changes to our cost accounting rules a necessary precondition to achieving the same result? And here, I think, the answer is no. Added to the detailed scrutiny we would normally provide in the course of the tariff review process are specific guidelines and filing requirements designed to highlight any misallocation of costs. In my judgment this approach should adequately safeguard the interests of telephone ratepayers as well as those of video dialtone's cable competitors. Moreover, should any legitimate issue of cost misallocation persist in an individual video dialtone tariff proceeding nothwithstanding these safeguards, I for one would not hesitate to provide interested parties a "fail-safe" defense in the form of granting access to the telephone company's underlying cost data pursuant to discovery authority under Section 403 of the Communications Act. For these reasons, and for purposes of proceeding at this point in time, I am satisfied with the approach the Commission elects today.

Finally, I should raise issues particularly close to my own public policy heart: whether broadcasters, commercial or noncommercial, should be granted free or reduced-rate access to carriage on video dialtone systems. Surely I give away no great secret when I say that, on a strictly policy level, such arrangements make eminent good sense to me. And yet I am sensitive to the need to develop as complete a record as we can on the on the decidedly complex legal and economic issues implicit in these initiatives. And so I look forward to reviewing in detail the comments filed in response to the questions we have posed in the Third Further Notice.

These are not, of course, the only difficult issues presented in the context of the video dialtone item we vote today. But with regard to all these issues, I cannot help but return to the observation, particularly true in complicated and controversial matters of public policy such as this, that the best is often the delayed enemy of the good. What we have in this item - although undoubtedly not the best to any single party interested in its outcome - is still a good, workable way of bringing the many benefits of video dialtone service to consumers in a fair and efficient way.

We have, for over a year, extolled the potential of the advanced information superhighway and the powerful and fundamental changes it can make in our everyday lives in the not-too-distant future. Video dialtone systems will constitute an important component - indeed, perhaps the first component - of that information superhighway to many people. It's time for the Commission to clear any remaining regulatory hurdles to the institution of video dialtone service that do not serve the public interest. In my judgment this reconsideration order does that, and it therefore has my support.

October 20, 1994

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 (CC Docket No. 87-266), and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service (RM-8221); Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking

In this Order, the Commission considers petitions for reconsideration of the 1992 Second Report and Order, as well as a joint petition for rulemaking filed by the Consumer Federation of America and National Cable Television Association seeking cross-subsidy rules specific to video dialtone service. In completing the re-examination of the rules for video dialtone services, the Commission affirms the basic regulatory framework for video dialtone subject to certain modifications, and substantially denies the joint petition. The Commission also dismisses the use of an "anchor programmer" structure and issues a Third Further Notice of Proposed Rulemaking seeking additional information and comment on various issues, including various capacity issues, the treatment of must carry provisions, and a "will carry" preferential access proposal.

When the Commission adopted rules governing the implementation of video dialtone service in June 1992, I supported the action as a major step in the regulation of converging technologies.[1] At that time, the Commission was careful to balance the interest of allowing telephone companies to provide additional video services over their networks with the interests of those parties who were seeking to prevent the telephone companies from participating in any aspect of the video services market. My decision then was based on several principles for analyzing the issues raised by our review of the rules, including (1) establishing a regulatory framework that could provide incentives for additional facilities based competition for video programming services; (2) providing regulatory incentives for telephone company investment in network modernization; and (3) establishing a formal review framework for monitoring the various issues that will be addressed by Section 214 review of video dialtone proposals, such as cost allocation matters and potential discrimination issues.

While supporting the Order and Authorization granting the New Jersey Bell Telephone

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[1] See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 (CC Docket No. 87-266), Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Separate Statement of Commissioner Andrew C. Barrett).

Company's Section 214 authority to construct, operate, own, and maintain facilities and equipment to provide video dialtone service in Dover Township, New Jersey -- the first such application to be granted -- I emphasized the importance of moving forward in authorizing video dialtone service in order to promote the significant public interest benefits that may be attainable through this new broadband service. My support for granting the authorization was premised on the understanding that we would need to continue to address the remaining fundamental concerns regarding the process of authorizing video dialtone services.[2] In particular, I was concerned that we needed to address the allocation of the costs among video services and other regulated voice services in greater detail at the tariff stage, and in the context of reconsideration.

I believe that the Commission's decision appropriately addresses the fundamental issues raised on reconsideration, especially with respect to the cost allocation concerns, by providing specific guidance regarding the identification of "direct costs" in the "new services test" for video dialtone tariffs. In viewing this decision on reconsideration, it is necessary to observe that the nature of competition in the multichannel video marketplace has fundamentally changed since the Commission issued its Second Report and Order on video dialtone in June of 1992, as the cable industry has become subject to pervasive regulation in significant aspects of its business, until incumbent cable operators become subject to "effective competition". As a result of this shift in the competitive and regulatory environment, the Commission's decision to continue along the path of authorizing video dialtone service is a fundamental step toward replacing the function of cable rate regulation with competitive constraints in the multichannel video marketplace. Despite the changes in the regulatory environment, I believe that the Commission's original goals for video dialtone service continue to guide us to move forward in authorizing the service in order to: (1) promote the development of an improved nationwide infrastructure, with broadband facilities extending to homes and businesses; (2) foster competition in the delivery of video and communications services; and (3) promote a diversity of information services. The changing regulatory environment, however, does focus attention on certain policy considerations regarding video dialtone, especially as we seek to provide regulatory parity for competing services.

With respect to the cost allocation issue, it is important to view the development of video dialtone service as a new broadband service, and not simply as a "new" service, because competing video services do exist. I also believe our regulatory approach must reflect the extent to which video dialtone service will constitute a truly incremental service, and identify where the components of the broadband network are common facilities for both voice and video service. Accordingly, the Commission's decision appropriately determines that existing rules, in conjunction with the tariff process, may provide a sufficient basis for identifying the direct costs of video dialtone service, while also providing a flexible mechanism for allocating the common costs to video and voice service that may be applied to individual video dialtone services. Furthermore, I am concerned that an attempt to establish "new" cost allocation rules to

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[2] See Order and Authorization, New Jersey Bell Telephone Company Video Dialtone Application (Dover Township, NJ), FCC 94-180, (released July 18, 1994) (Separate Statement of Commissioner Andrew C. Barrett).

accommodate this broadband service would further complicate the regulatory treatment of video dialtone service, without regard to the diverse networks that are developing to provide the service. As a policy matter, I believe the existing rules and new services test in the tariff process, along with the guidance provided in this decision, will provide a reasonable base to determine a price floor for video dialtone service, while providing the opportunity to gather and assess the information necessary to determine whether the results of this approach ultimately are producing a fair allocation.

I have been concerned, however, that the Commission's treatment of the cost allocation issues must address the policy concerns resulting from the competitive role of video dialtone relative to other multichannel distributors. This concern is heightened by the incentives and opportunities for LECs to establish a price for video service at a level that could cause an anticompetitive result due to cross-subsidies associated with voice services. To the extent that the process for identifying direct costs under the new services test in the tariff process will provide a measure of flexibility to telephone companies in reporting incremental costs and allocating the common costs of video and voice service, the policy concerns resulting from the development of video dialtone service might be exacerbated. I support this decision, however, because of the specific guidance developed to identify the elements of direct costs, including the incremental costs associated with plant dedicated to video dialtone service. In addition, it is important to emphasize that we have provided further guidance in defining the price floor for video dialtone service as we will expect LECs to include a reasonable allocation of other costs associated with shared plant used to provide video dialtone and other services in their estimation of direct costs, where such common costs exist. The use of the new services test also will maintain a measure of flexibility for LECs in allocating common costs provided that they follow a consistent and clearly delineated allocation process for other services. Therefore, this approach for cost allocation will avoid the inefficiencies of other possible allocators, such as cost- or revenue-based proportions, or a fixed allocation factor. In my estimation, none of these alternatives would realistically reflect a given LEC's practices or unique architecture for their broadband network for video dialtone service, and, thus, would mandate an artificial allocation scheme. In balancing the interests of continued steps toward authorizing video dialtone services with the need to establish a basis for determining an efficient and reasonable allocation of costs for that service, I emphasize that the determination of the cost allocation process and the pricing for video dialtone necessarily will be resolved during the 214 application and tariff process. These processes are intended to elicit and analyze much of the information required to establish an accurate cost and rate structure for any LEC service, including video dialtone.

Yet, I have been convinced for some time that the complexity of our costing and other procedures would not be able to cope with the far reaching changes in technology and market structures.[3] Indeed, I have stated that once the local exchange carriers are transporting broadband and video along with existing voice services, and wireless services are used

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[3] See "Beyond Price Caps: Escaping the Traditional Regulatory Framework", delivered by Commissioner Andrew C. Barrett to Florida Economic Club, August 27, 1992.

extensively for local access, the allocation of costs will have little meaning. The Commission's decision will create a new price cap basket for video dialtone service, and the combination of voice and video services will raise new policy concerns for the current price cap structure that maintains vestiges of rate-of-return regulation by requiring the allocation of costs among the LECs' respective services. I am concerned, therefore, that we will have to be consider the significant implications of this decision for the Commission's use and review of the LEC price cap mechanism, and I will be interested in how the Commission will address these questions related to the authorization of video dialtone service in the context of the LEC price cap review.

This decision also opens an inquiry proceeding focusing on a concern of both federal and state regulators in terms of the implications for the jurisdictional separations process resulting from the introduction of new technologies, including broadband technology, into local exchange carrier networks. I support the effort to establish a dialogue between state and federal regulators on the fundamental questions related to cost treatment and the evolving nature of LEC networks. Given the complexity of these issues and the cost allocation results for video dialtone services in the tariff process, it will be important for both federal and state regulators to monitor the results of implementing regulatory procedures for video dialtone and work toward refining the jurisdictional separations process.

I also support the conclusion in this decision to dismiss proposals for "anchor programmer" structures by requiring LECs offering video dialtone to make available a basic common carrier platform with sufficient capacity to serve multiple video programmers, and may not provide all or substantially all of the video dialtone platform capacity to any one programmer. I am concerned that allowing video programmers such wide latitude to participate in the operation of the basic video dialtone platform would raise great risk of discrimination. To the extent that economic or marketing considerations would create incentives to rely primarily on a single programmer, I also am concerned that this result would be more consistent with "cable" service rather than the common carrier obligations under Title II of the Communications Act. I do believe, however, that channel sharing mechanisms, depending upon their structure, may offer significant benefits to customers, such that it will be useful to seek further comment to establish specific rules to govern channel sharing arrangements.

Finally, to the extent that this decision embodies a measure of flexibility for LECs, I will be interested in the Commission's actions to provide substantial flexibility to cable operators to augment the cable rate regulations through "going forward" provisions with clear incentives to add channels and to provide "a la carte" offerings. In addition, as the Commission develops final cost-of-service rules for cable systems to justify rates above the benchmark, it will be important for those standards to be compatible with the identification of direct costs and standards for allocating common costs in the video dialtone context. To that end, we must establish standards for allocating common costs for cable operators as they upgrade their distribution networks to

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[4] See Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, NPRM (rel. Feb. 16, 1994), 9 F.C.C. Rec. 1687 (1994).

provide voice services.

Conclusion

Video dialtone will promote needed competition in the multichannel video services market, facilitate development of an advanced, national information infrastructure, and offer consumers more choices. While we seek to further telephone company participation in the video services market, we have taken care to craft a regulatory structure designed to protect consumers and competition alike. I will watch with anticipation and a careful eye as video dialtone develops, and will stand ready to make any necessary modifications to our rules.

October 20, 1994

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Video Dialtone (CC Docket No. 87-266)*

Today we continue our development of policies pertaining to the much-discussed "convergence" of communications businesses. This item presents the first opportunity for three of the Commission's five members to review in a comprehensive manner the video dialtone rules promulgated in 1992. For all five of us, this reconsideration proceeding allows us to reflect upon technology, marketplace, and policy developments occurring since the original decision and to recast and refine video dialtone policies in light of current circumstances.

Video dialtone has the potential to be a highly successful construct. The fundamental concept is sound: a basic video delivery platform, provided on a common carrier (non-discriminatory) basis, serving multiple programmer-customers, and expanding as demand increases. This approach creates a significant new role for local exchange carriers in the delivery of video programming.

The three principal goals of video dialtone, as articulated in the 1992 order, remain valid. First, we are resolved to promote competition in the delivery of video programming, primarily because competition leads to lower prices, better services, and the like, but with the added benefit that competition will enable us to eliminate regulation of cable rates. Second, we want to stimulate investment in advanced telecommunications infrastructure. Third, we also expect, over the longer term, to expand consumer choice in programming and to encourage the development of innovative new services. Video dialtone can play a crucial role in all these areas.

Yet we must also acknowledge that there are dangers. A variety of competitive and consumer concerns have been raised, and we have done our best to answer them with the necessary safeguards.

In the remaining years of this decade, video dialtone and related offerings will likely stimulate tens if not hundreds of billions of dollars of local exchange carrier investment in network upgrades. Proper allocation of these costs is essential to protect consumers who do not choose to use telco-provided video services. Unfair leveraging of market power must be avoided; we seek not simply competition but competition which is <u>fair</u> and which has the best possible chance of being <u>sustainable</u> over the long run.

* * * * *

This order reflects a careful, and I believe appropriate, balancing of interests. The basic framework adopted in the prior order has been affirmed, but today's decision is tailored to fit our current assessment of relevant considerations.

We have modified our earlier jurisdictional determination in a manner which is more accommodating of the legitimate interests of the states. We have tightened the explanation of the "new services test" and thereby reduced the risk that costs of network upgrades will be allocated disproportionately to nonvideo services. We have added discussions of the Section 214 and tariff review processes so that all parties will understand the measures we are relying upon to ensure compliance with our rules and policies. We have pledged careful scrutiny of cost allocation manuals, initiation of a notice of inquiry on jurisdictional separations issues, and consideration of a separate price cap basket for video dialtone services. We have also noted the states' freedom to apply their own standards in deciding which costs to allow in establishing intrastate rates, even if they have flowed through our separations process.

In these and other respects, we have tried to be responsive to legitimate concerns. But we remain determined to see video dialtone succeed. We have rejected proposals which would have delayed video dialtone for prolonged periods or saddled it with burdens that would have doomed it from the start. We have adopted an approach that I believe is fair, responsible, practical, and prudent.

We have also identified several important issues that warrant further review. I have a particular interest in the issue of consumer privacy and strongly support the decision to ascertain what subscriber information will be available to video dialtone platform providers, so that we can then determine whether additional privacy safeguards are needed. I will also be interested to review additional information regarding channel sharing plans, such as the "will-carry" proposal and the proposal that public broadcasters receive preferential rates for access to the video dialtone platform.

Other issues that have arisen during the course of our deliberations on video dialtone will be addressed in other proceedings. In this regard, I appreciate the assurance that "redlining" issues will be carefully and promptly considered, once the Bureau has had an opportunity to review the record compiled in response to a petition for rulemaking filed by five consumer and civil rights organizations.

In deliberations such as have occurred on video dialtone, it is inevitable that one or another of us would have preferences or concerns not shared by the majority. This is not the result of fractiousness but of five independent Commissioners applying their own skills and perspectives to the issues at hand. The matter of non-equity relationships is one that I would have preferred to handle differently; our decision to permit a wide range of relationships between the carriers and their customer-

programmers increases incentives for discriminatory behavior and places more of a burden on our monitoring responsibility and on our complaint process. This concern is somewhat attenuated by our decision, with which I fully concur, to reject proposals for "anchor-programmers," which would represent a significant departure from the basic precepts of the video dialtone model. The prospect of discrimination is also somewhat alleviated by the Bureau's commitment to enforce common carrier obligations rigorously.

We are not giving anyone carte blanche. Our action today reflects a continuing commitment to promote and protect the interests of the American consumer.

* * * * *

For a time, it had appeared that Congress might this year enact legislation updating the Communications Act of 1934, in recognition of the new circumstances presented by construction of the Information Superhighway. When the legislative drive faltered, we needed to decide how best to proceed under existing statutes. Today's action shows that the Commission is steadfastly determined to move ahead -- to promote video competition and to spur investment by telephone companies -- even as we hope that Congress returns to these issues early in the new year. At the same time, we signal our strong support for local exchange competition.

I am optimistic about the benefits that will flow from video dialtone. As I wrote when we approved the first Section 214 application for a commercial video dialtone service, in Dover Township, New Jersey:

> A new day is dawning. No longer will telephone companies simply provide telephone services and cable companies merely provide video programming services. Video dialtone, together with direct broadcast satellite and wireless cable, can -- over time -- provide consumers with a range of choices. As in other areas where the Commission has promoted the introduction of competition, competition in video delivery services will foster lower prices, stimulate new services, and encourage the development and deployment of new technologies.

Progress in these areas will inevitably be incremental. There is a danger that expectations will exceed results. Nonetheless, I have high expectations of video dialtone.

Our work in this important area is not by any means finished. We have further stages to complete in this rulemaking and other important undertakings in companion dockets. Section 214 applications and tariff processing will test our resources and our resolve.

I am confident that the video dialtone regime can be successful. Today's decision is at once both a measured step and a long stride in the right direction.

October 20, 1994

SEPARATE STATEMENT

OF

COMMISSIONER RACHELLE B. CHONG

Re: Video Dialtone Reconsideration (CC Docket No. 87-266)

By this action, the Commission takes a significant step to promote competition in the delivery of video services to consumers. Our video dialtone rules, as modified on reconsideration, provide a regulatory framework that permits telephone companies to compete as common carriers in the market for multichannel video services. Up to now, in the vast majority of localities in the country, that market has consisted of a single multichannel video programming service provider. As telephone companies implement video dialtone systems, however, consumers will be able to choose among competing multichannel video programming service providers. Because video dialtone comports with my fundamental belief that competitive markets -- rather than heavily regulated, monopolistic ones -- best serve the public interest, I am pleased to support the Commission's decision on reconsideration.

The Continued Need for Video Dialtone

In recent years, regulators and legislators have grappled with issues related to the lack of competition in the video market. One of the overarching goals of the Commission's August 1992 video dialtone decision was to "increas[e] competition in the video marketplace" consistent with existing law.[1] Shortly thereafter, Congress enacted legislation to address this problem as well. Like the Commission's video dialtone policy, the Cable Act of 1992 rests on a determination that cable television operators often face no local competition from alternative multichannel video programming distributors. Congress explicitly found that the dearth of competing multichannel video providers resulted in "undue market power for the cable operator as compared to that of consumers and video programmers."[2]

Just last month, the Commission issued its first report to Congress on video competition as mandated by the Cable Act of 1992. We stated that "[t]he market for the distribution of multichannel video programming remains heavily concentrated at the local level, and for most households, cable television is the only provider of multichannel video

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[1] Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 7 FCC Rcd 5781, para. 1 (1992).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460 (1992).

programming."[3] We concluded that "[c]able systems continue to have substantial market power at the local distribution level."[4] Moreover, in 1994, Congress considered, but did not enact, sweeping telecommunications legislation that would have facilitated telephone company participation in video programming services. These legislative and regulatory responses reveal both Congress' and the Commission's serious concern about the level of competition in the video services market.

Presently, due to the lack of competition in the multichannel video services market, rates for cable services are regulated in most areas of the country. The rate regulation provisions of the Cable Act of 1992 seek to ensure that consumer interests are protected "where cable systems are not subject to effective competition."[5] When a cable system does face "effective competition," as defined by the statute, its rates are exempt from regulation.[6]

Because rate regulation under the Cable Act of 1992 depends on whether "effective competitive" exists in a particular locality, an opportunity exists to facilitate competition and thus obviate the need for cable rate regulation. Regulation of cable television rates, in my estimation, is a complex, burdensome and resource-intensive proposition for cable operators, local franchising authorities and the Commission. I can think of few more important public interest objectives than to pursue regulatory policies, such as video dialtone, that introduce effective competition in the multichannel video services market. By expeditiously promoting such competition, we may diminish and eventually eliminate the need for cable rate regulation.

Against this backdrop, we reconsider the video dialtone rules the Commission promulgated in 1992. As this discussion makes clear, however, video dialtone remains just as relevant in today's world as it did two years ago.

Video Dialtone -- The Big Picture

Video dialtone heralds the convergence of video and telephony. In approaching this important decision, I have tried to place video dialtone within the broader context of our regulation of telecommunications generally. We are experiencing rapid change in technology, competition, markets and industries. We must therefore constantly reassess existing regulations to ensure that they make sense in today's world.

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[3] First Report, CS Docket No. 94-48, FCC 94-235 at 5 (released Sept. 28, 1994).

[4] Id.

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(4), 106 Stat. 1463 (1992).

[6] 47 U.S.C. § 543(a)(2).

In this regard, video dialtone presents important implications for how we regulate multiple markets and converging industries. I believe it is in the public interest to view our regulation of the cable industry through the prism of the state of competition in the multichannel video services market. As competition increases in that market -- as a result of video dialtone or otherwise -- I believe it may be appropriate to afford cable operators more flexibility to respond positively to that increased competition. Cable operators, like telephone companies, should play an important role in building advanced telecommunications facilities and bringing innovative services to consumers. Our existing regulations should be reassessed and any new rules designed to encourage this participation by the cable industry.

Likewise, the advent of video dialtone and other broadband services presents implications for our existing telephone industry regulation. We currently are reviewing the performance of our price cap rules for local exchange carriers.[7] As part of that review, we are reexamining the validity of the current productivity offset factor and the earnings sharing mechanism embodied in the Part 61 rules. The emergence of telephone company participation in the video services market may be relevant to our review of these and other aspects of the price cap regime.

Further, I believe we should critically assess our existing jurisdictional separations rules as we move toward broadband, integrated facilities capable of transmitting voice, video and data. We need to ensure that our separations rules adequately address the evolving nature of common carrier networks. In this regard, I am pleased that we are announcing our intention to initiate a broad inquiry to examine separations issues. We will need to draw on the ideas and experience of state regulators in this inquiry. This dialogue may lead to concrete proposals to amend our Part 36 rules to reflect current and future conditions.

Finally, the telephone industry has for some time advocated a comprehensive review of our access charge rules. As video dialtone and other broadband services emerge, we will need to reexamine our Part 69 rules to see what changes may be appropriate in a rapidly changing environment.

Guiding Principles

I would like briefly to touch on several other principles that guided my decision in this proceeding. First, I believe that construction of broadband, integrated telecommunications facilities will bring significant benefits not only to consumers of video services, but also to consumers of voice and data services. Video dialtone is one piece of the regulatory puzzle that will facilitate the development of an advanced national information infrastructure. Such a sophisticated network of information and communications networks will bind us together as a people and enrich our everyday lives. Futurists are just beginning to realize the potential of

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[7] See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

the NII to improve education, health care, government services and economic development for all areas of our country. The Information Age is about to deliver some dazzling new services and products to us all.

This view ultimately led me to conclude that regulating video dialtone pursuant to our existing accounting, cost allocation, jurisdictional separations, access charge and price cap rules is a reasonable approach. To the extent that experience with video dialtone implementation or other broadband services reveals systemic problems or unanticipated results, we can and should revisit our rules and make needed changes.

Second, I believe we can implement video dialtone and encourage infrastructure development without asking telephone ratepayers to shoulder an unacceptable burden. There is a concern expressed by some parties that telephone companies will price video dialtone service as low as possible in order to maximize market share in video services, while at the same time assigning significant costs of network upgrades to telephony services. As to telephone companies pricing video dialtone services to capture market share, there is nothing inherently nefarious in such a strategy. In America's free market economy, businesses daily make market entry pricing decisions like this as a matter of normal business strategy. Nevertheless, legitimate concerns exist regarding the potential anticompetitive results of such pricing and fairness issues related to infrastructure costs. It is incumbent upon the Commission to guard against anticompetitive pricing and to ensure an equitable allocation of costs among rates charged for various services offered over integrated facilities. I am mindful of these concerns.

Ultimately, I was persuaded that it was not possible to promulgate rules dictating precise allocations of common costs and overheads associated with network upgrades to video dialtone services. As the pending Section 214 applications of the telephone companies amply demonstrate, telephone companies have proposed markedly different architectures for video dialtone systems that present unique cost allocation issues. Indeed, as it should, the Commission has encouraged innovation and diversity in video dialtone systems. A one-size-fits-all approach to cost allocation would not adequately address these varying situations, and would result in unnecessary delay in introducing competition to the video services market.

Instead, I believe that the Section 214 process and the tariff review process provide a flexible framework to accommodate the important and varying issues presented by diverse video dialtone proposals. With respect to the tariff review process, we are clarifying the application of the price caps "new services" test in the context of video dialtone. This is designed to address the concern that rates for video dialtone may be unreasonably low. We are providing some advance guidance in this decision as to what we will consider a reasonable allocation of common costs and overheads to video dialtone rates. The Commission will examine with care tariff filings by telephone companies proposing to offer video dialtone, and I will not hesitate to join my colleagues in exercising the Commission's powers under Title II to address unreasonably low rates. Careful scrutiny of video dialtone tariff filings, coupled with our existing price cap rules, should provide an equitable framework for video dialtone.

Moreover, we direct the Common Carrier Bureau to collect data regarding the implementation of video dialtone and the results obtained under our existing rules. This monitoring program should help us detect any problems or unanticipated results and respond accordingly.

Finally, I am firmly committed to the common carrier model for telephone company provision of video dialtone service. I look forward to a day when any entity can enter any sector of the communications market and compete according to the same ground rules. At the present time, however, we have different statutory schemes for telephone companies and cable operators. So long as a telephone company offering video dialtone service does not provide video programming directly to subscribers in its telephone service area, it is not subject to Title VI requirements governing cable communications.[8] Under our rules and consistent with traditional Title II requirements governing common carriage, video dialtone providers must provide sufficient capacity on the basic platform to serve multiple video programmers on a nondiscriminatory basis. Moreover, they must expand capacity, when technically feasible and economically reasonable, to meet increases in demand. These bedrock common carrier principles are at the heart of video dialtone and distinguish video dialtone from traditional cable television service. As one court recently noted, common carriage is what makes video dialtone and cable "very different creatures."[9]

Telephone companies have urged us to approve various proposals designed to address a perceived shortage of analog channel capacity, at least during the initial stages of video dialtone. In this decision, we reject a proposal to permit one video service provider to use a large majority of available analog channels on the video dialtone platform. I support this portion of the decision because I believe that the so-called "anchor tenant" proposal is inconsistent with the notion of common carriage. Other so-called "channel sharing" proposals have been advanced by telephone companies to address the issue of limited analog channel capacity. I support the decision to seek further comment on these proposals, many of which were brought to the attention of the Commission through recent Section 214 applications and ex parte filings in this docket. I am hopeful that these further comments will augment the record and allow us to examine more fully the extent of the problem and consider creative solutions. While I remain open to these various proposals, I will examine the record to determine whether they can be implemented consistent with common carrier principles and other applicable law.

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[8] See National Cable Television Ass'n. v. FCC, No. 91-1649 (D.C. Cir. Aug. 26, 1994) (telephone company providing video dialtone service need not obtain a cable franchise under Title VI).

[9] Id., slip op. at 18.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-285
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding	)	
	)	

FIFTH MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1994 **Released:** November 23, 1994

By the Commission: Chairman Hundt and Commissioners Barrett and Ness issuing separate statements.

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I. INTRODUCTION

1. By this action, we resolve petitions for reconsideration or clarification of our rules governing competitive bidding for "entrepreneurs' block" licenses in the 2 GHz band Personal Communications Service (broadband PCS).[1] Twenty-six petitions were received, as well as 17 oppositions and 8 replies.[2] Specifically, in this *Fifth Memorandum Opinion and Order*, we resolve issues associated with our entrepreneurs' block rules, as well as other provisions we established to ensure that small businesses, rural telephone companies and businesses owned by minorities and women (collectively termed "designated entities") have meaningful opportunities to participate in the provision of broadband PCS. Our goal in this proceeding is to ensure that designated entities have the opportunity to obtain licenses at auction as well as the opportunity to have meaningful involvement in the management and building of our nation's broadband PCS infrastructure. Thus, as we describe below, we make certain modifications to our rules so that they will better serve these goals.

2. When the new broadband PCS auction rules were adopted in the *Fifth Report and Order*, the Commission declared its intent to meet fully the statutory objective set forth by Congress in Section 309(j) of the Communications Act.[3] In particular, we observed that it was the mandate of Congress that the Commission should "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given an opportunity to participate in the provision of spectrum-based services."[4] We also noted that Congress has directed us to "promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."[5] With these congressional directives in mind, we established the entrepreneurs' blocks and designated entity provisions contained in the *Fifth Report and Order*, which are now under reconsideration.

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[1] The Commission designated frequency blocks C (1895-1910/1975-1990 MHz) and F (1890-1895/1970-1975 MHz) as "entrepreneurs' blocks". *See Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (released July 15, 1994), *reprinted at* 59 Fed. Reg. 37,566 (July 22, 1994)(*Fifth Report and Order*). We also address herein petitions for reconsideration or clarification filed in response to the Commission's *Order on Reconsideration*, FCC 94-217 (released August 15, 1994), *summarized*, 59 Fed. Reg. 43,062 (August 22, 1994).

[2] A list of parties filing petitions for reconsideration, oppositions, replies and *ex parte* submissions is contained in Appendix A.

[3] *See* 47 U.S.C. § 309(j).

[4] *See Fifth Report and Order*, FCC 94-178, at ¶ 12. *See also* 47 U.S.C. § 309(j)(4)(D).

[5] *See Fifth Report and Order*, FCC 94-178, at ¶ 9. *See also* 47 U.S.C. § 309(j)(3)(B).

3. Although we wish to "fine-tune" some aspects of our rules, we generally conclude that the "entrepreneurs' block" concept and the special provisions for designated entities adopted in the *Fifth Report and Order* are the most efficient and effective means to fulfill our statutory mandate to provide for a diverse and competitive broadband PCS marketplace. In particular, we have adopted measures to ensure opportunities for meaningful participation by minority and women-owned businesses in the emerging broadband PCS marketplace by providing that such entities are eligible for bidding credits, installment payments, and the benefits of tax certificates, and by adopting eligibility rules that accommodate noncontrolling equity investment.

4. On reconsideration of the *Fifth Report and Order*, we weigh the recommendations of those who have asked us to modify our rules. While we conclude that for the most part our rules will remain unchanged, we find that some rule modifications are necessary to further empower businesses owned by women and minorities and designated entities generally to participate in broadband PCS. Also, our rules need to be clarified in some instances to provide entities wishing to participate in the entrepreneurs' blocks with greater certainty and a better understanding of what is expected of them. In general, our rule changes will grant designated entities, particularly minority and women-owned applicants, additional flexibility in how they raise capital and structure their businesses. Minority-owned applicants, for example, should be able to draw more readily upon the financial resources and expertise of other successful minority business enterprises. Our revised rules seek to accommodate the many existing minority and women-owned firms that want to enter the PCS market, but whose existing corporate structures do not meet the criteria for entry prescribed in the *Fifth Report and Order*. Thus, experienced minority and women entrepreneurs, who are likely to succeed in the broadband PCS marketplace, are not inadvertently barred from participating in the entrepreneurs' block under our new rules. In sum, our revised rules permit entrepreneurs' block applicants to structure themselves in a way that better reflects the realities of raising capital in today's markets, and to obtain the necessary management and technical expertise for their PCS businesses.

5. As we indicated above, a primary objective on reconsideration is to ensure that our rules promote diversity and competition in the PCS marketplace of the future. In this regard, we believe a special effort must be made to enable minority and women-owned enterprises to enter, compete and ultimately succeed in the broadband PCS market. These designated entities face the most formidable barriers to entry, foremost of which is lack of access to capital. In our effort to provide opportunities for minorities and women to participate in PCS via the auctions process, we strive for a careful balance. On one hand, our rules must provide applicants with the flexibility they need to raise capital and structure their businesses to compete once they win licenses. On the other hand, our rules must ensure that control of the broadband PCS applicant, both as a practical and legal matter, as well as a meaningful measure of economic benefit, remain with the designated entities our regulations are intended to benefit.

6. After reviewing the record, we amend or clarify our entrepreneurs' block rules in

several respects.[6] We emphasize that these changes constitute a refinement of our original entrepreneurs' block rules adopted in the *Fifth Report and Order* that will further advance our objectives of promoting competition and diversity in the broadband PCS marketplace. In summary, we have decided to:

- Modify the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as small businesses to be investors in an applicant's control group. Allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group.

- Retain the requirement that a designated entity's control group own at least 25 percent of the applicant's total equity, but require that only 15 percent be held by controlling members of the control group that are minorities, women or small/entrepreneurial business principals. The composition of the principals of the control group determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The minimum 15 percent may be held unconditionally, or in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price less than or equal to the current market valuation of the underlying shares at the time of filing FCC Form 175 (short-form). The remaining 10 percent of the applicant's equity may be held in the form of either stock options or shares, and we will allow certain investors that are not women, minorities or small business/entrepreneurial principals to hold interests in such shares or options that are part of the control group's equity. Thus, the 10 percent portion may be any combination of the following: (1) stock options or shares held by investors in the control group that are women, minorities, small businesses, or entrepreneurs; (2) management stock options or shares held by individuals who are members of an applicant's management team (which could include individuals who are not minorities or women or who have affiliates that exceed the entrepreneurs' blocks or small business size standards); (3) shares or stock options held by existing investors of businesses in the control group that have been operating and earning revenues for two years prior to December 31, 1994; or (4) shares or stock options held by noncontrolling institutional investors. Three years after the date of license grant, the 25 percent minimum equity requirement would be reduced so that the principals in the control group would be required to retain voting control and at least a 10 percent equity interest in the licensee.

- Modify the alternative equity option available to applicants controlled by women and/or minorities (*viz.*, a 50.1 percent equity investment in the applicant with other non-attributable investor(s) holding no more than a 49.9 percent interest) to provide

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[6] Our rule amendments are attached as Appendix B. We delegate to the appropriate Bureau the authority to revise and create forms as needed to ensure that PCS applicants comply with our rules. *See* 47 C.F.R. §§ 0.201-0.204. *See also* 47 U.S.C. § 155(c).

that 30 percent of the applicant's equity must be held by principals of the control group that are minorities or women, and may also be in the form of options as described above. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not minorities or women under the same criteria described above. After three years from the date of license grant, the women and/or minority principals of the control group must hold at least 20 percent of the total equity in the licensee and voting control.

- Amend our rules to provide that when the sole member of the control group is a firm or corporation that was operating and earning revenues for at least two years prior to December 31, 1994, qualifying principals will only be required to own a 10 percent equity interest in the applicant from the outset (or 20 percent if the 49.9 percent investor option available to women and/or minorities is used).

- Exempt applicants that are small, publicly-traded corporations with widely dispersed voting stock ownership from the control group requirement if the company is not controlled by any entity or group of shareholders holding a controlling interest in the company's voting stock. As the applicant, such a company therefore must own all the equity and voting stock to qualify for the exemption. Amend our rule to define a small, publicly-traded corporation with widely dispersed voting power as a business entity in which no person (as defined by the Federal securities laws) (1) owns more than 15 percent of the equity; or (2) has the power to control the election of more than 15 percent of the members of the board of directors.

- Simplify our rules by eliminating (a) the $100 million personal net worth cap for all attributable investors investing in applicants for entrepreneurs' block licenses, and (b) the $40 million dollar personal net worth cap for all attributable investors in an applicant seeking to qualify as a small business.

- Create a limited exception to our affiliation rules that would exclude the gross revenues and assets of affiliates controlled by minority investors or enterprises that are members of the applicant's control group from our financial caps that are the entry criteria for the entrepreneurs' block and are utilized to qualify as a small business. Exempt applicants affiliated with Alaska Native Corporations and Indian tribes from the same financial caps, except create a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in determining whether such an applicant qualifies as an "entrepreneur" and as a "small business."

- Clarify that persons or entities that are affiliates of one another or that have an "identity of interests" will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining compliance with our equity requirements. Thus, for example, if two entities have formed a joint venture or a consortium to apply for PCS licenses in the A and B frequency blocks, they will

be treated as a single entity and their separate interests will be aggregated when investing in the same entrepreneurs' block applicant.

- Define control of the applicant for purposes of entrepreneurs' block licenses by looking at traditional standards for determining *de facto* and *de jure* control and, in addition, provide guidelines for establishing and maintaining *de facto* control.

- Clarify the scope of permissible management agreements between noncontrolling investors (or others) and entrepreneurs' block applicants.

- Clarify that rights of first refusal, supermajority voting rights and other such "standard terms" used to protect investments of noncontrolling shareholders do not individually trigger transfers of control. The Commission will review such provisions in the aggregate, in light of the totality of the circumstances, to determine whether they will be deemed to confer and/or relinquish control. A critical factor in such analysis will be whether the provisions involved vary from the recognized standard under our case law. Under no circumstances may such provisions operate to force the designated entity to transfer its equity or control.

- Amend the attribution rules by raising the amount of voting interest that qualifies as nonattributable from 15 percent to 25 percent. This change allows existing companies with established financial structures the opportunity to compete in the entrepreneurs' blocks, and does not sacrifice the objective of retaining control in the control group (which must still retain at least a 50.1 percent voting interest). Clarify that under our amended rule, the maximum permissible nonattributable ownership interest that a noncontrolling investor may hold is equal to, but no greater than, 25 percent of the total equity of the applicant (which may include no more than 25 percent of the applicant's voting stock).

- Clarify that rights of first refusal will not be considered on a fully-diluted basis for purposes of calculating the ownership levels held by investors in an applicant. Also, stock "puts" exercisable after the expiration of the license holding period are generally not attributable to shareholders holding such options until their exercise date. Stock "calls" held by investors, on the other hand, are immediately attributable holdings.

- Maintain bidding credits at current levels.

- Offer installment payments for all entrepreneurs' blocks licensees, regardless of applicant or BTA size. For companies that are not minority or women-owned and have revenues between $75 million and $125 million, create a new class of installment payments, with slightly less generous terms.

- Extend the period in which small businesses owned by minorities and/or women are

allowed to make interest-only payments from five to six years.

- Clarify that we will permit entrepreneurs' block licensees to transfer entrepreneurs' block licenses after their third year of ownership, to other entrepreneurs' block licensees even if the licensee has grown beyond our size limitations to qualify as an entrepreneur or small business. In years four and five, and subject to applicable unjust enrichment provisions, entrepreneurs' block licensees may transfer licenses to any entity that either holds other entrepreneurs' block licenses or that satisfies the eligibility criteria at the time of transfer.

- Retain the rule that limits the number of entrepreneurs' block licenses any single entity may purchase at 10 percent of the total entrepreneurs' block licenses.

- Clarify the definition of "members of minority groups" to be consistent with the definition of minority used in other contexts.

- Provide guidance on issues associated with an entrepreneurs' block licensee's financial insolvency or in the event of default on installment payments to the Commission.

II. BACKGROUND

7. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. § 309(j).[7] This section gives the Commission express authority to employ competitive bidding procedures to select among mutually exclusive applications for certain initial licenses. In the *Second Report and Order* in this proceeding, the Commission exercised its authority by determining that broadband PCS licenses should be awarded through competitive bidding and prescribed a broad menu of competitive bidding rules and procedures to be used for all auctionable services.[8] We re-examined certain aspects of these general rules and procedures in the *Second Memorandum Opinion and Order* (released August 15, 1994).[9]

8. In the *Fifth Report and Order*, we established specific competitive bidding rules

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[7] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 388 (1993).

[8] *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*).

[9] *Second Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-215 (released Aug. 15, 1994) (*Second Memorandum Opinion and Order*).

for broadband PCS.[10] We also decided in the *Fifth Report and Order* to conduct three separate auctions for broadband PCS licenses: the first for the 99 available broadband PCS licenses in MTA blocks A and B; the second for the 986 broadband PCS licenses in BTA blocks C and F (the "entrepreneurs' blocks"); and, the third for the remaining 986 broadband PCS licenses in BTA blocks D and E.[11] The rules adopted in the *Fifth Report and Order* address auction methodology, application and payment procedures, and other regulatory safeguards.[12] In addition, we established the entrepreneurs' block licenses to insulate smaller applicants from bidding against very large, well-financed entities.[13] We also supplemented our entrepreneurs' block regulations with other special provisions designed to offer meaningful opportunities for designated entity participation in broadband PCS. In particular, we made bidding credits and installment payment options available to those entrepreneurs and designated entities that, according to the record of this proceeding, have demonstrated historic difficulties accessing capital.[14] Additionally, we extended the benefits of our tax certificate policies to broadband PCS minority and women applicants to promote participation by these designated entities in the service.[15] We also adopted attribution rules that

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[10] The *Third Report and Order* in this docket established competitive bidding rules for narrowband PCS. *See Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941 (1993), *recon. Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, FCC 94-219 (released Aug. 17, 1994). Also, in a recent *Order*, we reconsidered on our own motion several aspects of our narrowband PCS competitive bidding rules. *See Order on Reconsideration* in PP Docket No. 93-253, FCC 94-240 (released Sept. 22, 1994) (*Order on Reconsideration*). The *Fourth Report and Order* in this docket established competitive bidding rules for the Interactive Video and Data Service (IVDS). *See Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[11] *See Fifth Report and Order*, FCC 94-178, at ¶ 37. When we crafted our broadband PCS licensing rules in Gen. Docket 90-314, we divided the licensed broadband PCS spectrum into three 30 MHz blocks (A, B, and C) and three 10 MHz blocks (D, E, and F). We also designated two different service areas: 493 Basic Trading Areas (BTAs) and 51 Major Trading Areas (MTAs). The 493 BTAs and 51 MTAs used in our broadband PCS licensing rules have been adapted from the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at 38-39. *See Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994), *Order on Reconsideration*, 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994).

[12] *Fifth Report and Order*, FCC 94-178, at ¶¶ 24-91.

[13] *Id.* at ¶¶ 113-118.

[14] *Id.* at ¶¶ 130-141.

[15] *Id.* at ¶¶ 142-145.

accommodate passive equity investment in designated entities, but ensure that control of the applicant resides in the intended beneficiaries of the special provisions.[16] Furthermore, we reduced the upfront payment required of bidders in the entrepreneurs' block.[17] Finally, we established partitioning rules to allow rural telephone companies to expedite the availability of offerings in rural areas.[18]

9. After the release of the *Fifth Report and Order*, we adopted on our own motion an *Order on Reconsideration*, which made two changes to our competitive bidding rules for broadband PCS concerning our attribution and affiliation requirements.[19] Specifically, we exempted from entrepreneurs' block affiliation rules, entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations. We also decided to permit nonattributable investors in a corporate applicant to own up to 15 percent of the corporation's voting stock, provided that the applicant's control group retains at least 25 percent of the equity and 50.1 percent of the voting stock. We applied this change to investors in both publicly-traded corporate applicants and applicants that are not publicly-traded. Most recently, however, we adopted a *Fourth Memorandum Opinion and Order* in this docket, in which we addressed issues raised in petitions for reconsideration of the *Fifth Report and Order* that involve our broadband PCS competitive bidding rules governing auction methodology, application and payment procedures, and regulatory safeguards to prevent anticompetitive practices among bidders.[20] In the instant *Fifth Memorandum Opinion and Order*, we resolve remaining matters in the petitions for reconsideration concerning our entrepreneurs' block rules, including our provisions for designated entities.

III. DISCUSSION

A. Concept of Entrepreneurs' Blocks

1. Authority and Amount of Spectrum

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[16] *Id.* at ¶¶ 158-168.

[17] *Id.* at ¶¶ 154-155.

[18] *Id.* at ¶¶ 158-153.

[19] *See Order on Reconsideration*, PP Docket No. 93-253, FCC 94-217 (released Aug. 15, 1994).

[20] *See Fourth Memorandum Opinion and Order* in PP Docket 93-253, FCC 94-246 (released Oct. 19, 1994). On November 17, 1994, we released an*Order*, which modified certain aspects of our stopping and anti-collusion rules, and preserved the right to change the timing of the entrepreneurs' block auctions. *See Memorandum Opinion and Order* in PP Docket No 93-253, FCC 94-295 (released Nov. 17, 1994).

10. Background. In the *Fifth Report and Order*, the Commission designated a portion of the broadband PCS spectrum available at auction for qualified entrepreneurs.[21] Eligible entrepreneurs can bid on BTA licenses in the C (30 MHz) and F (10 MHz) blocks.[22] In addition, entrepreneurs who fall within one of the four statutory "designated entity" categories (*i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses.[23]

11. Petitions. The Association of Independent Designated Entities (AIDE) contends that the Commission exceeded its statutory authority in establishing the entrepreneurs' blocks because they potentially benefit entities that fall outside of the four designated entity groups enumerated by Congress.[24] AIDE maintains that the entrepreneurs' blocks reduce meaningful opportunities for smaller designated entities to participate in PCS by forcing them to bid against "entrepreneurs" that may not qualify as designated entities. AIDE further argues that the Commission impermissibly restricted the availability of financial incentives to designated entities for use only in Blocks C and F.[25] Instead, AIDE requests that the Commission make its financial incentives for designated entities available for every auctionable broadband PCS license.[26] The United States Interactive & Microwave Television Association and the United States Independent Personal Communication Association (USIMTA/USIPCA) (filing jointly) support the entrepreneurs' block concept, but encourage the Commission to provide additional broadband PCS spectrum exclusively for designated entities.[27] Citing Congress' concern about the historical impediments that small, minority and women-owned businesses have encountered, USIMTA/USIPCA maintain that "it would not be unreasonable" to set

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[21] *Fifth Report and Order*, FCC 94-178 at ¶¶ 118-129. An applicant's eligibility to participate in the entrepreneurs' blocks is based on its size as measured by specified financial caps. *See* discussion *infra* at ¶¶ 17-45.

[22] *Id.* at ¶¶ 121, 127.

[23] *Id.* at ¶¶ 130-155. *See* discussion *infra* at ¶¶ 97-113.

[24] AIDE Petition for Reconsideration (AIDE Petition), filed Aug. 22, 1994, at 13-15. AIDE maintains that small business consortia, passive investors, and entrepreneurs that meet the eligibility restrictions would improperly benefit under the Commission's entrepreneur block scheme.

[25] *Id.* at 16-17.

[26] *Id.* at 17.

[27] United States Interactive & Microwave Television Association and United States Independent Personal Communication Association Petition for Reconsideration (USIMTA/USIPCA Petition), filed Aug. 22, 1994, at 3.

aside up to one-half of the available PCS spectrum.[28] Finally, GTE Service Corporation (GTE) requests the Commission eliminate the entrepreneurs' blocks and instead allow designated entities to "partner" with major investors and be eligible for more generous bidding credits.[29] Additionally, GTE contends that our entrepreneurs' block scheme unduly restricts the ability of cellular carriers to participate in the provision of PCS.[30] Specifically, GTE contends that this scheme, combined with the PCS-cellular crossownership restrictions, will effectively limit eligibility for many cellular operators to 20 MHz of spectrum on the D and E blocks.[31]

12. Decision. Contrary to AIDE's contention, it is within our statutory authority to establish the entrepreneurs' blocks, for which parties other than designated entities are eligible to apply for or invest in, and we believe that this scheme will provide meaningful opportunities for designated entities to participate in the provision of broadband PCS. Accordingly, we will retain the entrepreneurs' block structure set forth in the *Fifth Report and Order*. In establishing a competitive bidding process for the provision of spectrum-based services, Congress gave the Commission broad authority to adopt bidding procedures and policies, so long as certain objectives are fulfilled. Specifically, Congress mandated that the Commission "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[32] Thus, the language of the statute allows us to consider other entities in order to ensure that licenses are widely dispersed among a variety of licensees,[33] so long as we also, among other statutory objectives, ensure that designated entities are given

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[28] *Id.* at 3-4.

[29] GTE Service Corporation Petition for Reconsideration (GTE Petition), filed Aug. 22, 1994, at 10-11. (Under GTE's proposal, designated entities would be eligible for a sliding scale of bidding credits that corresponds to the level of outside investment in the applicant.)

[30] GTE Petition at 2.

[31] GTE Petition at 4.

[32] *See* 47 U.S.C. § 309(j)(3)(B).

[33] We believe the term "including" used in Section 309(j)(3)(B) of the Communications Act is a term of enlargement, not limitation, intended to convey that other entities are includable together with, rather than excluded from the categories of designated entities so long as legislative intent is satisfied. *See* 2A Sutherland, Statutory Construction § 47.23 (4th ed. 1984).

the opportunity to participate in the provision of broadband PCS.[34]

13. The entrepreneurs' blocks approach adopted in our *Fifth Report and Order* achieves the statute's objectives by creating significant opportunities for designated entities and other entrepreneurs to ensure that licenses are widely disbursed to entities that can rapidly deploy broadband PCS services. As discussed more fully *infra*, we are making additional changes to our rules (including eliminating the personal net worth cap and liberalizing our affiliation rules for individual minority investors) to help designated entities overcome particularly intractable historic difficulties in accessing capital. To satisfy Congress' directive, we established the entrepreneurs' blocks in conjunction with a package of benefits that are narrowly tailored to provide significant opportunities to designated entities and those entrepreneurs that lack access to capital.

14. We disagree with USIMTA/USIPCA who requests that the Commission provide additional spectrum for entrepreneurs' blocks.[35] Our existing allotment, which comprises one-third of the total amount of licensed broadband PCS spectrum, is sufficient to ensure that designated entities and other entrepreneurs have significant opportunities to participate in the PCS marketplace. We therefore deny petitioners' various requests for modification to our entrepreneurs' block provisions.

15. We also reject AIDE's proposal to make bidding credits and other special provisions available to all designated entities bidding on all of the broadband PCS frequency blocks (not just the C and F blocks).[36] Our existing approach of limiting these special provisions to the entrepreneurs' blocks, coupled with changes we are making today are narrowly tailored to meet Congress' objective of ensuring that designated entities have the opportunity to participate in broadband PCS. The record does not support broadening this relief to include additional frequency blocks, nor is there substantial support for broadening the availability of special provisions generally.

16. Similarly, we do not accept GTE's argument that we should do away with the entrepreneurs' blocks and instead offer bidding credits as well as other special provisions across all broadband PCS frequency blocks. As we already explained in the *Fifth Report and Order*, in our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will

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[34] 47 U.S.C. § 309(j)(4)(D).

[35] USIMTA/USIPCA petition at 3-4.

[36] *See* Omnipoint Communications Inc. Opposition, filed Sept. 9, 1994, at 7-12; Columbia PCS Opposition, filed Sept. 9, 1994, at 2-3; Black Entertainment Television Holdings, Inc. Opposition, filed Sept. 9, 1994, at 7 (opposing GTE's proposal to eliminate entrepreneurs' blocks).

bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. We also disagree with GTE's contention that our entrepreneurs' block plan unduly restricts the ability of cellular carriers to provide PCS. We believe that the public interest benefits of establishing an entrepreneurs' block outweigh the need to provide additional opportunities for cellular operators as GTE describes. Moreover, our rules do allow cellular operators such as GTE to take noncontrolling interests in designated entities and gain opportunities in the entrepreneurs' block. We have recently relaxed the cellular-PCS crossownership rules to facilitate such opportunities.[37]

2. Gross Revenues and Other Financial Caps

a. Gross Revenues and Total Assets

17. Background. In the *Fifth Report and Order*, the Commission established eligibility rules for the entrepreneurs' blocks based, in part, on an applicant's gross revenues. To bid in the entrepreneurs' blocks, the applicant, its attributable investors (*i.e.*, members of its control group and investors holding 25 percent or more of the applicant's total equity), and their respective affiliates must cumulatively have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant files its Form 175 ("short-form" application).[38] We pointed out in the *Fifth Report and Order* that the $125 million gross revenues limit corresponds roughly to the Commission's definition of a "Tier 2," or medium-sized local exchange carrier (LEC) and would include virtually all of the independently-owned rural telephone companies.[39] Additionally, to qualify for the special provisions accorded small businesses, the applicant (including attributable investors and affiliates), must cumulatively have less than $40 million in gross revenues averaged over the last three years.

18. Petitions. MasTec, Inc. (MasTec) argues that the Commission's gross revenues test is misleading when applied across the board to all applicants because the gross revenues of investors operating in different industries will not convey the same information about size or the ability to attract capital.[40] The Telephone Electronics Corporation (TEC) notes that the discontinuity between gross revenues and the ability to attract capital is particularly acute

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[37] *See Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994), at ¶¶ 33-34.

[38] *Fifth Report and Order*, FCC 94-178 at ¶ 121. *See also* 47 C.F.R. § 24.709(a)(1).

[39] *Fifth Report and Order*, FCC 94-178 at ¶ 123 n. 99. *See also* 47 C.F.R. §§ 32.11 (a), (e) (Tier 2 definition).

[40] MasTec, Incorporated Petition for Reconsideration (MasTec Petition), filed Aug. 22, 1994, at ¶ 7.

where the entity in question is involved in a volume-intensive business with high operating costs and small profit margins (such as TEC's interexchange resale carriers).[41] Accordingly, TEC argues that the Commission's gross revenue criteria are not rationally related to their stated purpose and should be eliminated.[42]

19. Several petitioners request that the Commission modify its gross revenues test, but disagree whether the limits should be liberalized or made more restrictive. For example, MasTec encourages the Commission to modify its designated entity criteria to include those minority businesses which are too small to compete outside of the entrepreneur blocks, but too large to qualify for the entrepreneurs' blocks.[43] The National Paging and Personal Communications Association (NPPCA) and USIMTA/USIPCA urge the Commission to reduce the gross revenues cap.[44] Specifically, NPPCA requests that the Commission reduce the gross revenues limit to $75 million and the total assets limit to $250 million.[45] NPPCA maintains that these modifications are needed because the present size standards encourage mid-sized companies to refrain from bidding in competitively unrestricted auctions and to compete, instead, against designated entities in the entrepreneurs' block auctions.[46]

20. As an alternative to increasing the gross revenues cap, Omnipoint Communications, Inc. (Omnipoint) and the National Association of Black Owned Broadcasters, Inc. (NABOB) argue that the "aggregation rule," under which the Commission will aggregate the gross revenues and total assets of the applicant, attributable investors and all affiliates in order to determine whether the applicant complies with the financial caps,[47] should be eliminated.[48] Omnipoint contends that a "multiplier approach," employed in other areas of Commission practice, should be used to determine compliance with the financial

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[41] Telephone Electronics Corporation Petition for Reconsideration (TEC Petition), filed Aug. 22, 1994, at 18-23.

[42] *Id.*

[43] MasTec Petition at ¶ 6.

[44] National Paging & Personal Communications Association Petition for Reconsideration (NPPCA Petition), filed Aug. 22, 1994, at 6-7; USIMTA/USIPCA Petition at 5-6.

[45] NPPCA Petition at 7.

[46] *Id.*

[47] *Fifth Report and Order*, FCC 94-178 at ¶ 121; *see also id.* at ¶¶ 158-168 (discussing attribution rules for the entrepreneurs' blocks).

[48] NABOB Petition for Reconsideration (NABOB Petition), filed Aug. 15, 1994, at 4-5; Omnipoint Petition for Reconsideration (Omnipoint Petition), filed Aug. 22, 1994, at 6-8.

caps.[49] Under this approach, the revenues and assets attributed to an applicant would be based on the revenues and assets of each attributable investor, multiplied by the percentage ownership interest in the applicant held by that investor.

21. Cellular Telecommunications Industry Association (CTIA) requests that the Commission prescribe specific dates for measuring the financial thresholds to determine entrepreneurs' block eligibility.[50] Specifically, CTIA requests clarification that gross revenues will be measured from the two years preceding September 23, 1993.[51] CTIA maintains that our current rules, referring only to the "last two calendar years," are ambiguous.[52]

22. Black Entertainment Television Holdings, Inc. (BET), Roland A. Hernandez (Hernandez), Columbia PCS, Inc. (Columbia PCS), and Omnipoint all request that we clarify our rules governing growth by entrepreneurs' block licensees and their attributable investors during the five-year holding period.[53] Our rule, promulgated in the *Fifth Report and Order*, states that "[a]ny licensee . . . shall maintain its eligibility [for the entrepreneurs' blocks] until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments . . . , debt financing, revenue from operations, business development or expanded service shall not be considered."[54] Petitioners ask us to clarify whether the following types of growth in assets, revenues, or personal net worth would result in a licensee's forfeiture of eligibility: (1) growth of applicant beyond the size limits by means of mergers or takeovers; (2) any control group member's growth beyond the size limits by means of appreciation of attributable investments or growth of attributable businesses; and (3)

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[49] Omnipoint Petition at 7-8.

[50] Cellular Telecommunications Industry Association Petition for Reconsideration (CTIA Petition), filed Aug. 22, 1994, at 10-11.

[51] *Id.* at 6. September 23, 1993 is the date the Commission adopted its broadband PCS service rules order. *See Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993).

[52] CTIA Petition at 6. *See* 47 C.F.R. § 24.709(a)(1); *Fifth Report and Order*, FCC 94-178 at ¶ 156.

[53] BET Petition for Reconsideration, filed Aug. 22, 1994, at 17 (BET Petition); Hernandez Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Hernandez Petition); Columbia, PCS Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Columbia PCS Petition) (We note that Columbia PCS has changed its corporate name to "GO Communications, Inc."); Omnipoint Petition at 3.

[54] *See* 47 C.F.R. § 24.709(a)(3).

affiliates' or attributable investors' growth beyond the size limits, by means of mergers or takeovers.

23. Decision. We will retain a single gross revenues size standard, which is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.[55] We anticipate that applicants will, in many instances, have several investors and that these investors will be drawn from various segments of the economy rather than from a single industry group such as telecommunications. The financial characteristics of these industry groups will vary widely,[56] and keying the size standard to each investor entity in question is thus administratively unworkable. A gross revenues test is a clear measure for determining the size of a business, and will produce the most equitable result for entrepreneurs' block applicants as a whole.

24. We will also retain the existing gross revenues and total assets limits for the entrepreneurs' blocks and for small business size status. We find the arguments of those who oppose any reduction in the gross revenues limit most persuasive.[57] BET, for example, supports the balance it perceives the Commission has struck between small and mid-sized firms by adopting a $125 million gross revenues test. We agree with BET that a decrease in the gross revenue limit would eliminate many mid-sized firms from entrepreneurs' block participation while not substantially raising the level of competition in the blocks. Conversely, an increase in the gross revenue limit would not necessarily provide for greater capital access for applicants. We believe our $125 million gross revenues test represents an appropriate benchmark for entry into the entrepreneurs' block, given our interest in including firms that, while not large in comparison to other telecommunications companies, are likely to have the financial resources to compete against larger competitors on the MTA blocks.

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[55] All federal agencies base eligibility of small businesses (or minority small businesses) to bid on a government contract set aside on the (single) size standard set forth in the solicitation. *See, e.g.*, 13 C.F.R. § 121.902. Eligibility for financial assistance from Small Business Investment Companies sponsored by the Small Business Administration is determined by a single size standard applicable across the board to all applicants or by the size standard applicable to the applicant's primary business activity. *See* 13 C.F.R. § 121.802. Size status for receiving surety guarantees or assistance under SBA's Small Business Innovation Research Program is also determined by a single, applicant-wide size standard. *See* 13 C.F.R. § 121.802(a)(3) and 121.1202, respectively.

[56] The *Standard Industrial Classification Manual*, upon which the Small Business Administration bases its industry size standards, identifies over 800 industry groups to which specific Standard Industrial Classification Codes are assigned. *Standard Industrial Classification Code Manual*, Office of Management and Budget, Executive Office of the President, 1987 ed.

[57] Omnipoint Petition at 6-8; BET Opposition at 17-18.

25. In addition, we will retain the aggregation methodology to assess the size of an applicant, with certain exceptions discussed *infra*. We reject NABOB's proposal to eliminate our aggregation rule and we cannot adopt Omnipoint's proposal to determine entrepreneurs' block eligibility and small business size status by separately evaluating the assets and revenues of each attributable investor. Aggregating the gross revenues and total assets of all attributable investors in and affiliates of the applicant is central to an accurate size determination, and consistent with the Small Business Administration's (SBA's) approach to similar determinations.[58] Viewing gross revenues and assets of each investor in isolation could result in very large entities bidding for these licenses. We reject Omnipoint's suggestion that a multiplier approach be used to make these size determinations. A multiplier is appropriate to arrive at an accurate determination of ownership interest in an applicant or licensee.[59] In this context, however, we are not concerned with ownership, but instead seek to make a financially-based size determination in order to assess whether an applicant is eligible for significant governmental benefits.

26. We agree with CTIA that clarification is required concerning the two-year period in order to provide applicants with a uniform way to measure gross revenues for purposes of qualifying for the entrepreneurs' blocks.[60] For the initial entrepreneurs' block auctions involving broadband PCS, companies should use audited financial statements for each of the two calendar years ending December 31, 1993 or, if audited financial statements are not prepared on a calendar-year basis, data from audited financial statements for their two most recently completed fiscal years. Therefore, if applicants and their investors do not have audited statements ending on December 31, 1993, they will have to use one annual statement ending at a later date (sometime in 1994). This approach will enable the Commission to obtain timely financial data while providing applicants with some degree of flexibility in their financial reporting practices. For subsequent entrepreneurs' block auctions (*i.e.*, license re-auctioning), we will require applicants to use their last two annual audited financial statements to determine compliance with the financial caps. Newly-formed companies should use the audited financial statements of their predecessors in interests, or financial statements current as of the time their short-form application is filed that are certified by the applicant as accurate.

27. Clarification is also needed with respect to the issue of growth and takeovers of an entrepreneurs' block licensee or its investors. We clarify our rules to the extent necessary to indicate what types of growth will jeopardize an applicant's continued eligibility as an entrepreneurs' block licensee during the holding period. A licensee could not maintain its eligibility if a member of its control group were itself taken over, effecting a transfer of control of the licensee during the license holding period. However, an attributable investor

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[58] *Fifth Report and Order*, FCC 94-178, ¶¶ 158, 201-207.

[59] *See, e.g.*, ¶ 71 *infra*.

[60] CTIA Petition at 10. *See also* MasTec Opposition at 16.

would not affect the licensee's continuing eligibility for the entrepreneurs' block if another of the investor's affiliates grew or its investments appreciated during the holding period. Our rules consider such growth either to be revenue from the investor's operations or to be normal business development and, in either case, fully permissible. If an attributable investor is taken over or purchased by another entity, the other entity steps into the shoes of the original investor and its assets and revenues will be considered under the continued eligibility rule. However, if an affiliate of the applicant is taken over by (or sold to) another entity, the other entity's assets and revenues would not be considered, so long as no new affiliation arrangement between the applicant and the other entity is created by the takeover or sale. That is, in most cases, the affiliation with the applicant would be severed by such a takeover and the gain from the sale of the affiliates' assets would have already been taken into account by the initial consideration of such assets at the time of application.[61] We emphasize that we have a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace. Thus, normal projected growth of gross revenues and assets, or growth such as would occur as a result of a control group member's attributable investments appreciating, or as a result of a licensee acquiring additional licenses (*see* discussion *infra* at paragraph 126 on holding period) would not generally jeopardize continued eligibility as an entrepreneurs' block licensee.

b. Personal Net Worth

28. Background. In addition to the gross revenues and assets caps, the *Fifth Report and Order* also established a personal net worth limit to determine eligibility for bidding in the entrepreneurs' blocks.[62] The current rules require that persons that are applicants, attributable investors in the applicant and all of their respective affiliates who are themselves individuals each have less than $100 million in personal net worth. Additionally, the rules require that if the applicant seeks to qualify as a small business each individual in the control group, attributable investors and all affiliates who are individuals, must have less than $40 million in personal net worth.[63]

29. Petitions. BET requests the Commission relax the personal net worth limits applicable to attributable investors in minority-owned firms.[64] BET argues that eliminating

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[61] Thus, for example, if Applicant A is affiliated with Corporation B and that corporation sells its business to Corporation C, the income derived from the sale would not affect Applicant A's continued eligibility, unless a new affiliation arrangement arises between Applicant A and Corporation C.

[62] See *Fifth Report and Order*, FCC 94-178 at ¶¶ 115; 47 C.F.R. § 24.709(a)(2).

[63] *Id. See also* 47 C.F.R. § 24.720 (defining "small business" for purposes of bidding on the entrepreneurs' blocks).

[64] BET Petition at 16-17.

the personal net worth standard would help ensure participation by minority and women-owned businesses by allowing successful individuals to bring their experience to bear in the PCS marketplace.[65] At the same time, BET argues that this measure would ensure that relatively small, minority and women-owned enterprises have a meaningful opportunity to participate in the provision of PCS.[66] TEC also requests the Commission liberalize its personal net worth standard to permit an attributable individual investor to hold up to $125 million in personal net worth.[67] MasTec claims that net worth/net revenue definitions are overly restrictive and will exclude those minority businesses that can best survive and succeed in the competitive PCS market.[68]

30. Decision. We will eliminate the personal net worth limits (both for the entrepreneurs' blocks and for small business size status) for all applicants, attributable investors, and affiliates. The obstacles faced by minorities and minority-controlled businesses in raising capital are well-documented in this proceeding and are not necessarily confined to minorities with limited personal net worth.[69] Therefore, we agree with the view that the personal net worth requirements should be eliminated in the case of minority-controlled applicants seeking to qualify for entrepreneurs' block licenses. However, rather than eliminate the personal net worth limits for minorities only, we will eliminate the requirement for all applicants because personal net worth limits are difficult to apply and enforce and may be easily manipulated. We do not believe that eliminating the personal net worth limits will facilitate significant encroachment by "deep pockets" that can be accessed by wealthy individuals through affiliated entities because, in those instances where access to such resources would create an unfair advantage, the affiliation rules, discussed *infra*, will continue to apply and require that such an entity's assets and revenues be included in determining an applicant's size. Thus, we emphasize that we believe the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.

c. Treatment of Affiliates

31. Background. The *Fifth Report and Order* sets forth specific affiliation rules for identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps

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[65] *See id.*; *see also* BET *ex parte* comments, filed Nov. 3, 1994, at 4.

[66] BET *ex parte* comments, filed Nov. 3, 1994, at 4.

[67] TEC Petition at 23-25.

[68] MasTec Petition at 2.

[69] *See, e.g., Fifth Report and Order,* FCC 94-178 at ¶ 100.

for the entrepreneurs' blocks (or for small business size status).[70] The affiliation rules were adapted from those used by the SBA for purposes of assessing size status and consequent eligibility to participate in SBA's loan, procurement and minority enterprise programs.

32. Specifically, our rules identify which individuals or entities will be found to control or be controlled by the applicant or an attributable investor by specifying which ownership interests or other criteria will give rise to a finding of control and consequent affiliation. In the August 15, 1994 *Order on Reconsideration* (discussed *supra* at paragraph nine), we exempted Indian tribes and Alaska Regional and Village Corporations (hereafter "Indian tribes") from the affiliation rules for purposes of determining eligibility to participate in bidding on the entrepreneurs' blocks.[71]

33. Petitions. BET and others argue that we did not provide adequate notice or opportunity to comment on the possibility of the Commission adopting affiliation rules for all entrepreneurs' block participants (specifically, minorities and women).[72] BET argues that we have thus violated the notice and comment requirements of the Administrative Procedure Act (APA), and that the Commission is required to issue a *Further Notice* prior to adopting the affiliation rules.[73] BET also contends that the affiliation rules add unnecessary complexity to the broadband auction rules and that they make it very difficult, if not impossible, for potential bidders to tailor their pre-existing business relationships and ownership structures to our eligibility requirements.

34. Several parties have filed petitions for reconsideration of our *Order on Reconsideration*.[74] On reconsideration of the *Fifth Report and Order,* several petitioners also

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[70] *Fifth Report and Order*, FCC 94-178 at ¶¶ 201-207.

[71] *Order on Reconsideration*, FCC 94-217 at ¶¶ 3-7. As we indicated in our *Order on Reconsideration,* we apply the term "Indian tribe" as it is statutorily defined in 25 U.S.C. § 450b(e) to include "any Indian tribe, band nation, or other organized groups or community, including any Alaska Native Village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians." *Id.* at ¶¶ 4 and n.7.

[72] BET Petition at 19-22. *See also* AIDE Petition at 19-22; Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc., Comments and Partial Opposition (MEANS/SDN Opposition), filed Sept. 9, 1994, at 10-11.

[73] BET Petition at 20.

[74] *See* BET Petition for Reconsideration of *Order* (filed Sept. 21, 1994); Cook Inlet Region, Inc., Petition for Clarification (Cook Inlet Petition)(filed Aug. 22, 1994). *See also* AIDE Petition for Reconsideration (filed Sept. 21, 1994) (seeking reconsideration of voting

challenge the limited exemption granted to Indian tribes or request that generic exemptions be granted for other applicants.[75] BET and MasTec oppose any special treatment for a particular minority group, arguing that the exemption accorded Indian tribes creates an imbalance of bidding power in favor of tribally-owned entities and will skew the broadband PCS auction results. Cook Inlet Region, Inc. (Cook Inlet) argues that the exemption for Indian tribes should be expanded to encompass eligibility for treatment as a small business for purposes of bidding credits and installment payments because: (1) Indian tribes are congressionally recognized as particularly disadvantaged; (2) such an exemption applies when determining size status for SBA's programs; and, (3) substantial legal constraints with respect to tribal property and businesses preclude their use to raise capital or to cross-subsidize other tribally-owned entities.[76]

35. More specifically, Cook Inlet asserts that Indian tribes and Native corporations deserve special treatment because they face legal constraints that differ from other minority-owned businesses.[77] According to Cook Inlet, Federal law prohibits Native corporations from pledging their stock as collateral for loans, issuing new stock to raise funds in traditional capital markets, or utilizing the majority of the revenues from their land holdings to invest in new enterprises.[78] Thus, Cook Inlet contends that Indian tribes and Native corporations should be exempt from both the affiliation rules and the small business test because Native corporations cannot utilize their assets or revenues to fund new business ventures in the same way other corporations can.[79] In reply, BET asserts that Alaska Regional Corporations still enjoy significantly greater access to capital than other minority-owned entities participating in the bidding for the entrepreneurs' block licenses despite any restrictions they might have on their assets.[80]

36. TEC seeks an exemption from the affiliation rules for rural telephone companies, arguing that regulatory and corporate barriers prohibit small telephone companies like TEC from shifting broadband PCS costs to their affiliated resellers and that courts have found

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equity change in *Order on Reconsideration*); AMP Opposition to Petition for Reconsideration (filed Oct. 17, 1994) (same).

[75] BET Petition at 5-6; MasTec Petition at 7-12.

[76] *See* Cook Inlet Petition at 1-2.

[77] Cook Inlet Opposition to Petition for Reconsideration (Cook Inlet Opposition), filed Oct. 14, 1994, at 1.

[78] *Id.*

[79] *Id.* at 1-2. *See also* Cook Inlet *ex parte* comments, filed Oct. 26, 1994, at 2.

[80] *Id.*

questions of affiliation to be irrelevant where such barriers to cross-subsidization exist.[81] MEANS/SDN suggests a more narrowly tailored exception that would exempt centralized equal access providers (*i.e.*, a consortia of rural telephone companies that provide centralized equal access and other sophisticated information services) from the Commission's affiliation rules.[82] MEANS/SDN argues that this modification would allow the consortia to bring their considerable expertise and efficiencies to bear in the deployment of broadband PCS.[83]

37. Decision. After considering petitioners' various concerns, we will not eliminate the affiliation rules. As explained fully below, however, we create a limited exception to our affiliation rules that will apply when an attributable minority investor or enterprise in an applicant or an applicant's control group has controlling interests in other concerns. We also revise our treatment of Indian tribes under our affiliation rules to more narrowly tailor our application of these rules to the unique status of these minority groups.

38. As an initial matter, we do not believe that promulgation of the affiliation rules violated the notice and comment requirements of the Administrative Procedures Act. Our *Notice of Proposed Rule Making* in this docket[84] alerted petitioners to the fact that the Commission was considering SBA's size standards which, by their terms (as set forth in the *Notice*), incorporate the concept of affiliation in determining a firm's small business size status.[85] The question of affiliation is integral to the concept of size status, by whatever means size status is assessed. Without affiliation rules, large firms may unfairly avail themselves of the preferences intended for small businesses and other designated entities since they have an incentive to create subsidiaries (that would have access to the parent's substantial resources) to compete against *bona fide* applicants in the entrepreneurs' blocks. Adoption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test.[86] It was reasonable for petitioners to conclude

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[81] TEC Petition at 14-15.

[82] MEANS/SDN Opposition at 5-11.

[83] *Id.*

[84] *See Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635, 7647 at ¶ 77 and n. 51, 78 (1993) (*Notice*).

[85] *See* 13 C.F.R. 121.802 (a)(2). *See also* 13 C.F.R. § 121.401 (a) (which provides that " . . . size determinations shall include the applicant concern and all its domestic and foreign affiliates). *See also* Cook Inlet Petition at 2.

[86] Rules adopted as a "logical outgrowth" of a *Notice of Proposed Rule Making* satisfy our APA notice requirements. *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *Small Refiner Lead Phase-Down Task Force v.*

that such rules would be applied in assessing eligibility for the entrepreneurs' blocks and for small business size status. Thus, sufficient opportunity to comment was provided on the affiliation rules since they play an integral role in any determination of size status. Moreover, we see no advantage in seeking additional comment on the affiliation rules since petitioners, such as BET, had a full and fair opportunity to suggest modifications to our affiliation rules, some of which we adopt on reconsideration. A *Further Notice* could also substantially delay the auction of entrepreneurs' block licenses.

39. Furthermore, we decline to adopt the suggestion that we eliminate the affiliation rules on the grounds that these rules are unduly complex or overburdensome.[87] Affiliation rules are an established and essential element in determining an applicant's compliance with a gross revenues (or other) size standard. Their use ensures that all financial and other resources available to a company will be considered in assessing its size status. The Commission's affiliation rules, in conjunction with its attribution rules, are intended to include in this calculation: (1) all individuals and entities that directly or indirectly control the applicant, any member of its control group, or any other investor having an attributable interest in the applicant; (2) any other entities also controlled by such individual or entity; (3) all entities over which the applicant has direct control or indirect control through an intermediary; and (4) all other entities over which a member of its control group or any other attributable investor has direct or indirect control. Elimination of the affiliation rules would result in an underassessment of an applicant's size and would present an unrealistic picture of the applicant's need for bidding credits, reduced upfront payments and installment payments.

40. We are persuaded, however, that a limited exception to our affiliation rules is appropriate for minority-owned applicants and applicants owned by a combination of minorities and women.[88] The exception will apply to affiliates controlled by investors who are members of minority groups who are attributable members of an applicant's control group. Under the exception, the gross revenues and assets of affiliates that the minority investor controls will not be counted in determining the applicant's compliance with the financial caps, both for purposes of the entry into the entrepreneurs' block and for purposes of the applicant qualifying as a small business.

41. This exception will permit minority investors that control other concerns to be

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EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor," otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. *See National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

[87] Omnipoint Petition at 17; BET Petition at 21; Mankato Citizens Telephone Company Opposition (Mankato Opposition), 2-3.

[88] MasTec Petition at 7; BET Petition at 5-6.

members of an applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues. By making such an exception, we further our goal of addressing traditional problems minorities have of accessing capital. As we documented in the *Fifth Report & Order*, minorities have faced and continue to face unique barriers to capital from traditional, non-minority sources.[89] To raise capital for a new business venture, therefore, minorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities; they may not have access to any other source of funds on which to draw.[90] Moreover, this exception permits minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past.[91] We therefore conclude that further tailoring of our affiliation rules to the specific capital formation problems of minorities is necessary to avoid eliminating a traditional source of capital for minority businesses -- the

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[89] *Fifth Report and Order*, FCC 94-178 at ¶¶ 98 - 100.

[90] *Id.* at ¶ 100 ("African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources . . .")(citing Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives, Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development, May 20, 1994).

[91] *See, e.g.*, Ellis, B., "Black Community Needs to Focus on Capital Formation," *The Philadelphia Tribune*, May 20, 1994, at 6A ("[R]ecent immigrants (in the African-American community) have utilized family and friends as a means of pooling their savings, -- *i.e.*, to form capital); Lee, E., "Korean American Grocers All Over the Country Hit Hard By Recession and Crime," *AsianWeek*, Dec. 17, 1993, Vol. 15, No. 17 at 1 ("[F]amily members often employed [in Korean-owned businesses] and informal Korean credit organizations give many business owners their starts . . . ."); Lesly, E., and Mallory, M., "Inside the Black Business Network," *Business Week*, Nov. 29, 1993, at 70 ("African Americans are forming pools of capital and new opportunities that are helping to overcome traditional barriers to success."); Miller, Y., "Improvements Seen in Minority Business Loans," *Bay State Banner*, Nov. 21, 1993, Vol. 29, No. 14, at 1 ("Many entrepreneurs in the minority community have their business cash flow tied up in their personal assets and expenses . . . ."); Stone, S., "Why Can't We All Get Along? Many Blacks, Koreans Find Understanding," *The Philadelphia Tribune*, Nov. 23, 1993, Vol. 110, No. 100 at 1a ("Koreans don't usually go to banks....What they have done is form their own [credit] pools . . . . Chinese-Americans also have lending pools; many Jamaicans have the same thing."); Wynter, L., "Understanding Capital is Key to Getting It," *Emerge*, Aug. 31, 1993, Vol. 9, No. 4, at 22 (minority venture capital firm finances several black-owned firms including Essence Communications and Earl G. Graves, Ltd).

minority community itself. We note that this exception applies only to affiliates controlled by minority investors in the applicant or members of the applicant's control group. The exception does not apply to affiliates of such investors or businesses that control the applicant or that have an attributable interest in the applicant. Thus, a minority-owned firm that exceeds the financial caps would not be able to create a subsidiary to participate in a PCS applicant's control group.[92]

42. As we established in our *Order on Reconsideration*, we treat Indian tribes differently under our affiliation rules for purposes of our entrepreneurs' block financial caps because of their unique legal status.[93] Specifically, we exclude the gross revenues and total assets of Indian tribes in our calculations for purposes of determining whether an affiliated applicant satisfies our entrepreneurs' block financial caps.[94] After considering the arguments of petitioners, we also will exclude generally the revenues of Indian tribes in our calculations for purposes of determining small business eligibility.[95]

43. In response to MasTec's and BET's concerns about special treatment for a particular minority group, we clarify that we exempt Indian tribes generally from our affiliation rules because Congress has imposed unique legal constraints on the way they can utilize their revenues and assets.[96] Cook Inlet contends that, while other minority-owned businesses can issue debt and equity securities and pledge their assets and securities to raise capital, the real and personal property interests held by Alaska Native Corporations are subject to a number of constraints -- both legal and cultural -- that affect their ability to manage and dispose of property.[97] For example, under the Alaska Native Claims Settlement Act, 43 U.C.S § 1601 *et seq.*, the stock held by Native corporations is subject to strict

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[92] For example, if M, an attributable minority investor in the applicant, controls Corporation C with assets of $500 million, but Corporation C does not control applicant A and is not an attributable investor in Applicant A, the assets and revenues of Corporation C will not be counted in assessing A's compliance with the financial caps for either the entrepreneurs' blocks or small business size status. On the other hand, if M Corporation, a minority-owned company with an attributable interest in Applicant A, is controlled by Corporation C in the above example, or is under common control with Corporation C, the assets and revenues of M Corporation's affiliates are attributable.

[93] *Order on Reconsideration*, FCC 94-217 at ¶ 1.

[94] *Id.*

[95] Cook Inlet Petition at 1-3; BET Opposition at 5-6.

[96] *See* MasTec Petition at 7-12; BET Petition at 5-6; BET Petition for Reconsideration of *Order* at 3-4.

[97] Cook Inlet Opposition at 1-2.

alienability restrictions - it cannot be sold, pledged, mortgaged, or otherwise encumbered.[98] Thus, Native corporations are precluded from two of the most important means of raising capital enjoyed by virtually every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities.[99] In addition, assets held by Indian tribes include land holdings that cannot be used as collateral for purposes of raising capital, because the land holdings are owned in trust by the federal government or are subject to a restraint on alienation in the government's favor.[100] Congress has not placed similar legal constraints on the assets and revenues of enterprises owned by any other minority group. We agree with Cook Inlet that such legal restraints on assets and revenues place Indian tribes at a disadvantage vis-a-vis other minority groups with similar revenues and assets.[101] Finally, as we noted in our *Order on Reconsideration*, Congress has mandated that the SBA determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe.[102] Our policy mirrors this congressional mandate.

44. After considering the record, however, we have determined that gaming revenues generally are not subject to the same types of legal restrictions as other revenues received by Indian tribes.[103] Therefore, we establish a rebuttable presumption that revenues derived from gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in our calculations when determining whether an applicant that is affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. Cook Inlet has set forth several reasons why we should treat gaming revenues differently from other types of Indian tribe revenues. First, these revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970.[104] Second, the Indian Gaming Regulatory Act provides certain Indian tribes with a non-traditional source of revenue that could be very substantial.[105] Cook Inlet also asserts that gaming revenues are not subject to the same types of legal and governmental controls as other revenues received

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[98] Cook Inlet Petition for Further Clarification, filed Sept. 7, 1994, at 4.

[99] *Id.* 4-5.

[100] *Id.*

[101] *Id.*

[102] *Order on Reconsideration*, FCC 94-217 at ¶ 4.

[103] Cook Inlet *ex parte* comments, filed Oct. 31 1994, at 2.

[104] Cook Inlet *ex parte* comments, filed Oct. 31, 1994, at 2.

[105] *Id.*

by Indian tribes, and therefore are more analogous to the revenues of non-Indian entities.[106] Furthermore, Congress granted the SBA (whose rules inspired our affiliation rules) flexibility to treat tribal and other affiliations with exceptional revenues differently if such revenues would create an "unfair competitive advantage."[107] Gaming revenues generated by tribal organizations, appear to be exceptional revenues that if not included, create an unfair competitive advantage in the auctioning of broadband PCS entrepreneurs' block licenses. Thus, we will include such gaming revenues in our calculations when determining eligibility for the entrepreneurs' block and for small business status, unless the entrepreneurs' block applicant establishes that it will not receive an unfair competitive advantage, because significant legal constraints restrict its ability (or an affiliate's ability) to access and utilize revenues from gaming.

45. Finally, we decline to create an exception to our affiliation rules for rural telephone companies.[108] We are concerned that relaxing our rules would unfairly match large rural telephone companies, with greater access to capital, against entrepreneurs and designated entities (including small and medium-size rural telephone companies). We note in this regard, that rural telephone companies already enjoy substantial regulatory benefits (*e.g.*, access to Rural Electrification Administration loans, discussed *infra* at paragraph 111) affecting available capital in comparison to other designated entities.[109] Moreover, we observe that rural telephone companies will be permitted to acquire partitioned licenses at any time after the close of auctions. We believe that existing measures will thereby achieve our goal of facilitating the rapid deployment of PCS to rural areas. At MEANS/SDN's request, however, we clarify that a centralized equal access provider (*i.e.*, a group of rural telephone companies that provide centralized equal access and other sophisticated information services)[110] will not be deemed an affiliate of each of its constituent members. Based on the record, it does not appear that such entities control their constituent members or that each of the members control the centralized equal access providers. Thus, for example, if two or more of MEANS' members form a consortium of small businesses that apply for the

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[106] *Id.*

[107] As we noted in our *Order on Reconsideration*, Section 7(j)(10)(J) of the Small Business Act gives the SBA the discretion to consider tribal and other affiliations if it determines that one or more such tribally-owned businesses has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category. *See* 15 U.S.C. § 636(j)(10)(J)(ii)(11).

[108] TEC Petition at 14-15 (requesting exemption from the affiliation rules).

[109] BET Opposition, at 16-17.

[110] *See, e.g.*, 47 C.F.R. § 69.112(i) (citing to *Transport Rate Structure and Pricing*, CC Docket No. 91-214, FCC 920442, 7 FCC Rcd 7002 (1992), *modified*, 8 FCC Rcd 5370, 5287 (1993) for description of "centralized equal access providers").

entrepreneurs' blocks, MEANS itself would not be attributed to each one of the small businesses. We agree with MEANS that this clarification will contribute to the efficient deployment of broadband PCS in rural areas.

B. Designated Entity Definitions

1. Minority and Women-Owned Businesses

46. Background. In the *Fifth Report and Order*, we adopted the definition of the term "members of minority groups" as set forth in our *Second Report and Order* in this docket.[111] Thus, we defined "members of minority groups" as ". . . individuals of African-American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction." [112]

47. Petition. Karl Brothers requests that the Commission amend its definition of "members of minority groups" to include businesses owned by individuals with disabilities.[113] Specifically, Karl Brothers suggest the Commission adopt the standard established in the SBA Section 8(a) program to determine who should qualify for designated entity status. According to Karl Brothers, this SBA program includes businesses owned by disabled individuals under a "means" and "socially disadvantaged" test. Karl Brothers maintains that the congressional mandate to give special preference to minority groups is not limited to just ethnic minorities, but should include other historically disadvantaged minorities. Karl Brothers maintains that Congress was merely giving examples of groups to be included in the definition of minorities, not limiting the definition to ethnic groups only. Karl Brothers contends that there is no statutory language excluding other disadvantaged groups.[114]

48. Decision. After considering Karl Brothers' request, we will not include persons with disabilities in the definition of minorities for purposes of bidding on the entrepreneurs' blocks and obtaining the special provisions available to minority applicants. The record in this proceeding does not contain any evidence that demonstrates that firms owned by persons with disabilities have more difficulty accessing capital than any other small business. In this

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[111] *See Fifth Report and Order*, FCC 94-178 at n. 157. *See also Second Report and Order*, 9 FCC Rcd 2348, 2397 n.209, *quoting Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 980 n.8 (1978) and *citing Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 849 n.1 (1982); 47 C.F.R. § 1.2110(b)(2)).

[112] *Fifth Report and Order*, FCC 94-178 at n. 157. *See* 47 C.F.R. § 24.720(i).

[113] Karl Brothers Petition for Reconsideration (Karl Brothers Petition), filed August 22, 1994, at 3.

[114] *Id.*

respect, the record of this proceeding on the difficulties that minorities, women and small businesses, in general, have experienced accessing capital strongly supports the special provisions we adopted for these groups.[115] Moreover, individuals with disabilities are not expressly named as a designated entity in Section 309(j)(4)(D) of the Communications Act, and there is no indication in the legislative record of the statute that Congress intended to expand this group of beneficiaries to include any group or individual that can demonstrate that it is "socially disadvantaged" similar to the SBA Section 8(a) approach described by the Karl Brothers.[116] Unlike the Small Business Act, Section 309(j)(4)(D) of the Communications Act does not contain the term "socially disadvantaged." *Compare* 47 U.S.C. § 309(j)(4)(D) *with* 15 U.S.C. § 637(a)(1), (4) and (5). We note that even in the SBA context, that agency presumes eligibility for Section 8(a) status for minority groups (which are defined in racial and ethnic terms), but firms owned by persons with disabilities must demonstrate that they are "socially disadvantaged" in order to gain entry into the program. Also, the SBA's denial of Section 8(a) status for firms owned by persons with disabilities where such "social disadvantage" has not been established, has been upheld in court.[117]

49. Additionally, there is no indication that in enacting Section 309(j)(4)(D) Congress intended to expand the definition of "members of minority groups" to include classes of persons other than racial or ethnic groups, such as those listed in the preceding subsection, Section 309(i).[118] We further observe that in no other Commission context, have we included disabled persons in the categories of groups that comprise our definition of minorities. Making such a change here, without clear statutory and legislative support to do so, would therefore be inconsistent with our traditional application of the definition, which we believe should be uniform in all licensing contexts.[119]

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[115] *See Fifth Report and Order*, FCC 94-178 at ¶¶ 93-112.

[116] *See* Karl Brothers Petition at 2-5.

[117] *See Doe v. Heatherly*, 671 F. Supp. 1081 (D. Md. 1978), *aff'd* 854 F.2d 1316 (4th Cir. 1988).

[118] 47 U.S.C. § 309(i)(3)(C)(ii). Below, we revise our definition of "members of minority groups" to conform to this statutory definition. In interpreting this definition in the past, we have taken a restrictive view of the categories of minorities included in this definition and limited its expansion. *See Third Report and Order,* Gen. Docket No. 81-768, 102 FCC 2d 1401 (1985).

[119] *See In re Petition of Paralyzed Veterans Of America, et. al, to Amend Regulations Facilitating Minority Ownership of Broadcast Facilities to Include the Physically Handicapped, Memorandum Opinion and Order,* FCC 85-651, 59 Rad. Reg. 2d (P&F) 1353 (released Dec. 16, 1985), *petition for review dismissed as untimely, California Assoc. of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333 (9th Cir. 1987).

50. We wish to emphasize also, that it is highly likely that most firms owned by individuals with disabilities will be eligible to bid in the entrepreneurs' block and for an installment payment option if they meet the required gross revenues and total assets test. Such firms may also be eligible for "enhanced" installment payments and bidding credits if they qualify as small businesses under our rules. Indeed, absent a substantial record that demonstrates firms owned by persons with disabilities have any more difficulty accessing capital than any other small business, we find that we cannot accommodate the Karl Brothers request.

51. We also note that we have before us a Petition for Rulemaking filed by David J. Lieto (Lieto Petition), which requests that the Commission amend Section 1.2110 of the Commission's rules to provide that disabled individuals are within the minority group categories and are thus entitled to the benefits associated with being a designated entity under the Commission's auction rules.[120] As stated above, we believe that our existing rules provide opportunities for individuals with disabilities to participate in the entrepreneurs' block, and that there is no direct statutory or record support for Lieto's request. Furthermore, Lieto has failed to provide a record comparable to that for women and minorities demonstrating that disabled individuals experience difficulties accessing capital that are unique to their status. Accordingly, we decline to initiate a rulemaking at this time, and hereby dismiss the Lieto Petition.

52. In response to numerous inquiries,[121] however, we revise the definition of "members of minority groups" slightly to conform with the definition of minority used in other contexts. [122] Thus, Section 24.720(i) of the Commission's rules shall read as follows: "Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."[123] We have also been asked to clarify the meaning of

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[120] *See* David J. Lieto Petition for Rulemaking, filed September 21, 1994, at 2-3.

[121] We received several inquiries about the definition of "members of minority groups" from participants in the FCC PCS seminars, which provided an overview of the PCS rules and procedures. The seminar series included sessions held in the following locations: Washington, D.C. (Aug. 29, 1994); Chicago (Aug. 22, 1994); Denver (Aug. 24, 1994); San Francisco (Aug. 26, 1994).

[122] *See, e.g., Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); 47 C.F.R. §§ 73.3555(d)(3)(iv), 1.1621(b); *see also* 47 U.S.C. § 309(i)(3)(c)(ii); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

[123] In a separate *Order*, we shall be making the same correction to the definition of minority groups used in the generic auction rules (*see* 47 C.F.R. § 1.2110(b)(2)) and the narrowband auction rules (*see* 47 C.F. R. § 24.320(f)).

particular categories in the definition of minority. Again, for consistency, we shall use the same category descriptions the Commission has relied on in other contexts.[124] These categories are as follows :

a. Black. A person having origins in any of the black racial groups of Africa.

b. Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

c. American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliations or community recognition.

d. Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

To address any specific claims or allegations regarding an individual race or origin, we will follow existing Commission precedent.[125] To the extent that prior Commission cases do not provide adequate guidance in specific cases, we may look to cases developed under minority programs in other federal agencies, such as the Office of Management and Budget (OMB) and the SBA.

2. Small Business Consortia

53. Background. In the *Fifth Report and Order* the Commission allowed a consortium of small businesses to qualify collectively for the preferences available to a small business if each business within the consortium individually satisfies the definition of a small business designated entity.[126] The Commission defined a small business designated entity as any company that, together with attributable investors and affiliates, has average gross revenues for the three preceding years of not in excess of $40 million.[127] We defined "consortium of small businesses" as a conglomerate organization formed as a joint venture

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[124] *See Broadcast Equal Employment Opportunity Rules and FCC Form 395*; *see also* "Instructions for Completing FCC Forms 395-A & 395-M," Section V (Race/Ethnic Categories).

[125] *See, e.g., Lone Cypress Radio Assoc. Inc.*, 7 FCC Rcd 4403 (Rev. Bd. 1992), and cases cited therein; *See also Storer Broadcasting Co.*, 87 FCC 2d 190, 191-93 (1981).

[126] *Fifth Report and Order*, FCC 94-178 at ¶ 180. *See also* 47 C.F.R. § 24.720(b)(3)).

[127] *Fifth Report and Order*, FCC 94-178 at ¶ 175. *See also* 47 C.F.R. § 24.720(b)(1).

among mutually-independent business firms, each of which individually satisfies the definition of a small business.[128] In the *Second Report and Order,* we concluded that consortia should not always be entitled to qualify for measures designed specifically for designated entities.[129] In the *Fifth Report and Order*, however, we stated that for the auctioning of broadband PCS, it is especially necessary to allow small businesses to pool their resources in this manner to help them overcome capital formation problems.[130] Thus, our rules provide that if a consortium's members are all small businesses (*i.e.*, defined as companies that do not have average yearly gross revenues for the preceding three years in excess of $40 million), the consortium as a whole will qualify for designated entity provisions for small businesses.

54. Petitions. Omnipoint requests that the Commission allow small businesses to form a single corporate applicant (rather than a joint venture) and get the same treatment as consortia.[131] BET requests that the Commission eliminate the preferences available to small business consortia.[132]

55. Decision. We believe the current preferences for small business consortia are adequate and necessary to ensure that small businesses have sufficient opportunities to participate in the broadband PCS auctions. Accordingly, we deny BET's request to eliminate the small business consortia preferences. As we observed in the *Fifth Report and Order*, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and ensure their participation in the provision of broadband PCS. We believe that small, rural telephone companies, in particular, are expected to use this mechanism to compete in some of the smaller markets.

56. We also deny Omnipoint's request that small businesses be allowed to form a single corporate applicant that would be afforded the same treatment as consortia. The concept of a consortium is that each small business participant remains a distinct corporate entity independent of other consortium members and that each member has rights and obligations similar, or equal to, those held by participants in other types of joint ventures. Allowing a group of small businesses to apply as one corporate applicant and receive the benefits of our consortia rule would disadvantage small, independent businesses wishing to bid as a group under our rule, but who cannot restructure as a corporate applicant and could tend to dilute each member's influence and insulate their responsibilities in the venture. We

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[128] *Fifth Report and Order*, FCC 94-178 at ¶ 179. *See also* 47 C.F.R. § 24.720(b)(3).

[129] *Second Report and Order*, FCC 94-61 at ¶ 286.

[130] *Fifth Report and Order*, FCC 94-178 at ¶ 180.

[131] Omnipoint Petition at 9.

[132] BET Petition at 7.

believe that such a change would also eviscerate our small business eligibility size requirement. We wish to clarify, however, that we intend to examine the qualifications of each consortium member to ensure that each is a *bona fide* small business. In this regard, it is assumed that each concern should be an entity "organized for profit" and not for the sole purpose of qualifying as part of a small business consortia. This is consistent with SBA's long-standing definition of "business concern." *See* 43 C.F.R. § 121.403(a), *Small Business Size Standards*, 54 Fed. Reg. 52634 (Dec. 21, 1989).

57. On another issue, BET contends that the $40 million gross revenues standard fails to comply with an SBA requirement that any size standard proposed by a federal agency that varies from SBA's standard be "proposed after an opportunity for public notice and comment" and be "approved by the Administrator [of the SBA]."[133] We believe we have fully met our notice and comment obligations, both under the Administrative Procedures Act and the Small Business Act, in this proceeding. We solicited comment on a range of size options, and received comment that included SBA's recommendation for a $40 million gross revenues cap (which we ultimately adopted). Indeed, we recently obtained SBA's approval of the $40 million size standard.[134]

C. Eligibility Requirements

1. Minimum Equity Limit for the Control Group

58. Background. In the *Fifth Report and Order*, the Commission adopted a methodology for assessing an applicant's compliance with the financial caps for the entrepreneurs' blocks and for small business size status based on the distinction between: (a) noncontrolling investors (whose financial status would not be attributed to the applicant); and (b) investors holding interests in the control group of the applicant.[135] The gross revenues, assets and personal net worth limits of attributable investors (*i.e.*, those with more than 25 percent equity) and *all* control group members, regardless of the size of their individual interests, are included in assessing an applicant's compliance with the financial caps.[136] To qualify as a women or minority-owned business, the Commission further required that the control group be composed entirely of women and minorities.[137] The control group

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[133] *See* 15 U.S.C. § 632(a)(2)(A) and (C). BET Reply to Oppositions to Petitions for Reconsideration, filed Sept. 22, 1994, at 7-8.

[134] *See* Letter to William Kennard, FCC General Counsel, from Philip Lader, SBA Administrator, Nov. 9, 1994 (responding to Aug. 19, 1994 request for size approval).

[135] *Fifth Report and Order*, FCC 94-178 at ¶¶ 158-59.

[136] *Id. See also Order on Reconsideration*, FCC 94-217 at 5-6.

[137] *Fifth Report and Order*, FCC 94-178 at ¶¶ 160-62, 181-92.

requirement ensures that designated entity and entrepreneur principals retain control of the applicant and own a substantial financial interest in the venture. At the same time, it enables noncontrolling investors outside the control group to provide essential capital to an applicant without their revenues, assets or net worth being attributed to the applicant or their non-minority or male status disqualifying the applicant.

59. The Commission adopted two control group options in the *Fifth Report and Order*.[138] Under the first option, passive investors are permitted to own up to 75 percent of the applicant's total equity, so long as: (1) no investor holds more than 25 percent of the applicant's passive equity (which was subsequently defined to include up to 15 percent of a corporation's voting stock); and (2) in the case of a corporate applicant, at least 50.1 percent of the voting stock is held by the control group.[139] In the case of partnership applicants, the control group must own all the general partnership interests.[140] The Commission determined that this minimum equity level strikes an appropriate balance between the competing considerations of permitting qualified bidders to raise capital and ensuring that designated entities receive a significant economic benefit from the venture.[141] The Commission extended an alternate option to qualified women or minority-owned businesses. Under this option, the Commission would permit a single investor in a women or minority-owned applicant to own up to 49.9 percent of the passive equity (which we subsequently defined to include up to 15 percent of a corporation's voting stock), so long as the control group holds the remaining 50.1 percent of the equity. As with the first option, the control group is required to retain control and, in the case of a corporate applicant, hold at least 50.1 percent of the voting stock.[142] Also, ownership interests are to be calculated on a fully diluted basis .

60. Petitions. Petitions filed by BET, Columbia PCS, CTIA, EATEL, Lehman Brothers and Omnipoint variously address the Commission's restrictions on the composition of an applicant's control group.[143] Specifically, petitioners request clarification that our attribution rules and definitions of minority and women-owned business be interpreted to

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[138] *Id.* at ¶¶ 158-163. As discussed *infra* at ¶ 65, one of the options is available only to women and minority-owned businesses.

[139] *Id.* at ¶ 158.

[140] *Id.*

[141] *Id.* at ¶ 159.

[142] *Id.* at ¶ 160. *See Order on Reconsideration*, FCC 94-217 at ¶ 10.

[143] BET Petition at 15-16; Columbia PCS Petition at 2-5; CTIA Petition at 4-10; EATELCORP, Inc. Petition for Reconsideration, (EATEL Petition), filed Aug. 22, 1994, at 3-7; Lehman Brothers Petition for Reconsideration (Lehman Bros. Petition), filed Aug. 22, 1994, at 4-5; Omnipoint Petition at 15-16.

permit "nonqualifying" noncontrolling investors *within* the control group.[144] "Nonqualifying" investors, as petitioners describe, are investors that are neither women nor minorities, or investors that if attributed would cause the applicant to exceed the financial caps. EATEL argues that to do otherwise may preclude participation by existing companies whose existing corporate structures would disqualify an applicant absent significant expenditures for corporate restructuring. EATEL maintains that existing entities have the greatest amount to offer applicants in terms of financial and technical resources.[145] Petitioners also request that the Commission allow a limited amount of equity investment in the control group to help the applicant comply with the 25 percent minimum equity requirement. Columbia PCS, for example, advocates adoption of a bright-line test that would require at least a 75 percent equity and a 100 percent voting interest in the control group to be held by "qualifying" entities.[146] Columbia PCS maintains that designated entities will be unable to raise sufficient capital unless this clarification is made.[147] EATEL and CTIA maintain that the 100 percent equity requirement for minority and women-owned control groups is too restrictive for entities already in existence. Instead, they argue that businesses which are in fact *controlled* by women and/or minorities, but which have numerous non-controlling shareholders (including some that are neither women nor minorities), should be eligible for the preferences we adopted for minority and women-owned businesses.[148] BET also requests clarification that a control group may be comprised of a single individual.[149]

61. Omnipoint, Columbia PCS, CTIA and Lehman Brothers contend that the 25 percent minimum equity ownership restriction is too high and that designated entities will face insurmountable difficulties arranging financing if it is not reduced.[150] To remedy this problem, Lehman Brothers proposes two alternative solutions. First, for publicly-traded companies, Lehman proposes that public shareholders with less than 5 percent equity should be counted towards the control group's 25 percent equity threshold. Lehman maintains that this proposal would permit control group equity to be diluted by new shareholders, but not

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[144] BET Petition at 16; Columbia PCS Petition at 2-4; EATEL Petition at 2-4; Lehman Bros. Petition at 4-5; Omnipoint Petition at 16.

[145] EATEL Petition at 5-6.

[146] Columbia PCS Petition at 2-4.

[147] *Id.* at 2.

[148] EATEL Petition at 6-7; CTIA Petition at 9-10.

[149] BET Petition at 16.

[150] Omnipoint Petition at 9-10; Lehman Bros. Petition at 3; Columbia PCS Petition at 2.

below a minimum equity level (Lehman recommends 10 percent).[151] Second, Lehman suggests that all designated entities should be permitted to dilute their 25 percent equity interests in the following circumstances: (a) not earlier than one year after license grant, to dilute control group equity to a total of not less than 20 percent; (b) not earlier than two years, to dilute control group equity to a total of not less than 15 percent; and (c) not earlier than three years to dilute control group equity to a total of not less than 10 percent. Lehman argues that this proposal would provide designated entities efficient access to capital, thereby improving their competitive position.[152] CTIA recommends that an applicant should be eligible to bid on the C and F blocks with at least 10 percent equity.[153] Lehman Brothers also requests that the Commission modify its control group definition to provide that members of the control group receive dividends, profits and regular and liquidating distributions in proportion to the actual possession of equity held, rather than in proportion to their interest in the total equity of the applicant. Lehman Brothers contends that our rules could be interpreted to mean that such distributions must be paid on options held but not exercised by control group members, rather than on the basis of actual shares held.[154]

62. Decision. After considering the record, and as described below, we modify our rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as a small business to be investors in an applicant's control group. We also allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group. We agree with petitioners that some accommodation should be made in our regulations to allow participation in an applicant's control group by existing firms controlled by designated entities or entrepreneurs that have investors that, if attributed, would cause the applicant to exceed the small business or entrepreneurs' blocks financial caps or, for minority or women-owned applicants, investors that are not minorities or women.[155] We will therefore modify our definition of a minority and women-owned business to include preexisting companies that are controlled by women or minorities but have noncontrolling investors in the control group who are not minorities or women. Similarly, we will allow preexisting companies that, in aggregate, meet our entrepreneurs' block and small business size standards to be members of the control group even if one or more of the noncontrolling investors in those companies would disqualify the company based on its gross revenues or total assets. We believe that these rule

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[151] Lehman Bros. Petition at 4. *See also* Impulse *ex parte* comments, filed Oct. 12, 1994, at 1-4 (arguing that a 25% minimum equity requirement, if maintained throughout the life of the venture, would severely limit normal capital formation by designated entities).

[152] *Id.* at 5.

[153] CTIA Petition at 9.

[154] *See* Lehman Bros. Petition at 6-8. *See also* 47 C.F.R. § 24.720(k)(iv).

[155] EATEL Petition at 5-7; Columbia PCS Petition at 2-4.

changes will provide a reasonable balance between the need to ensure that designated entities have a significant economic investment in the applicant and the financing realities of a PCS venture.

63. We also agree with petitioners that it is not optimal to require the qualifying control group members to hold at least 25 percent of the applicant's equity. The record indicates that in many cases, designated entities and entrepreneurial principals will have limited capital to contribute to the applicant's equity and that noncontrolling investors will be unwilling to advance funds to enable the designated entity (even one with management expertise) to reach the 25 percent threshold.[156] Thus, without some modifications to our rules, designated entities could face insurmountable difficulties in arranging financing. We therefore conclude that we should modify our rules to address petitioners' concerns, while balancing the need to ensure meaningful equity participation by "qualifying" control group members.[157]

64. Specifically, we will retain the 25 percent minimum equity requirement for the control group, but we will require only 15 percent (*i.e.*, 60 percent of the control group's 25 percent equity contribution) to be held by qualifying, controlling principals in the control group (*i.e.*, minorities, women or small/entrepreneurial business principals).[158] For example, if the applicant seeks minority or women-owned status, the 15 percent equity (as well as 50.1 percent of the voting stock of the applicant) must be owned by control group members who are minorities and/or women. If the applicant seeks small business status, 15 percent of the equity must be held by control group members who, in the aggregate, qualify as a small business.[159] The composition of the principals of the control group determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The 15 percent may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The

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[156] AirTouch *ex parte* comments, filed Oct. 12, 1994, at 2; Columbus Grove Telephone Co., *ex parte* comments, filed Oct. 5, 1994, at 2.

[157] *See* Appendix C (chart illustrating changes to the control group's voting and ownership thresholds).

[158] *See* Media Communications Partners *ex parte* comments, filed Oct. 11, 1994, at 7-8.

[159] For instance, if a preexisting company wants to qualify as a small business control group, its gross revenues and total assets will be added to the gross revenues and assets of each of its controlling shareholders and to those of all affiliates. The resulting sum must be under $40 million in gross revenues and $500 million in total assets. The gross revenues and total assets of the company's preexisting, noncontrolling shareholders will be ignored, however.

remaining 10 percent (*i.e.*, 40 percent of the control group's minimum equity contribution) may be held in the form of either stock options or shares, and we will allow certain investors that are not minorities, women, small businesses or entrepreneurs to hold interests in such shares or options. Specifically, we will allow the 10 percent portion to be held in the form of shares or stock options by: (1) investors in the control group that are women, minorities, small businesses or entrepreneurs; (2) individuals who are members of an applicant's management team (which could include individuals who are not minorities or women or individuals who have affiliates that exceed the entrepreneurs' block or small business size thresholds); (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (4) noncontrolling institutional investors.[160]

65. As discussed *supra* at paragraph 59, the Commission also adopted an alternative to the 25 percent minimum equity requirement for minority and women-owned businesses, which permits a single investor to hold as much as 49.9 percent of its equity, provided the control group holds at least 50.1 percent. Several petitioners have expressed similar concerns with respect to the need to revise the 50.1 percent requirement.[161] Therefore, in tandem with, and for the same reasons as, the modifications to the 25 percent equity requirement, we make similar modifications to the rules governing the 50.1 percent minimum equity requirement. Accordingly, where a minority or women-owned business uses the 50.1 percent minimum equity option, we will require only 30 percent of the total equity to be held by the principals of the control group that are minorities or women. The 30 percent may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not women or minorities under the same criteria described in paragraph 64 above. That is, the 20.1 percent portion of the control group's equity may be held in the form of shares or stock options by any of the following: (1) investors in the control group that are minorities, women, small businesses or entrepreneurs; (2) individuals who are members of an applicant's management team (which could include individuals who are not minorities or women, or individuals who have affiliates that exceed the entrepreneurs' block and small business size standards); (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (4) noncontrolling institutional investors.[162]

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[160] *See* note 162 *infra* (explaining definition of institutional investors).

[161] *See, e.g.*, BET Petition at 16; Columbia PCS Petition at 2-3; Omnipoint Petition at 9.

[162] For our purposes, we define institutional investors in a manner that is similar to the definition that is used by the Commission in the attribution rules applied to assess compliance with the broadcast multiple ownership rules. We modify that definition slightly, however, to fit this service. Specifically, we expect that investment companies will be important sources

66. In addition, the control group minimum equity requirement will be reduced three years from the date of license grant as suggested by Lehman Brothers, but the control group must still retain voting control (*i.e.*, 50.1 percent of the vote).[163] According the control group the option to reduce the equity requirement accommodates the needs of designated entity licensees to raise capital as they build out their systems.[164] Significantly, the three-year mark corresponds with the end of the no transfer period under our license holding rule. In the case of a licensee that has chosen the 25 percent minimum equity option, the principals in the control group will only be required to hold 10 percent of the licensee's equity after three years, with no further equity requirements imposed on the control group. Similarly, in the case of a licensee that has used the 50.1 percent minimum equity option, the principals in the control group will be required to hold 20 percent of the licensee's equity, and no further equity requirements will be imposed on the control group.

67. After reviewing the record, we are persuaded that these changes will afford the control group greater flexibility in raising the necessary equity for participation in the entrepreneurs' blocks. In particular, we are allowing that 10 (or 20.1) percent of the equity can come from sources that otherwise would not qualify for the control group. In making these limited changes to the control group equity requirements, we believe the amended rules will: (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.

68. With respect to our decision to allow investment in the control group by investors of preexisting firms, the business involved must be a going concern that has been in existence for a reasonable period of time prior to adoption of our rules in order to avoid any sham arrangements. Specifically, the business involved must have been operating and

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of capital formation for designated entities. Accordingly, we adopt a definition that specifically includes venture capital firms and other smaller investment companies that may not be included in the definition of investment companies found in 15 U.S.C. § 80a-3 (which is cited in our broadcast rules at 47 C.F.R. § 73.3555 Note 2(c). Specifically, we define an *institutional investor* as an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. § 80a-3(a), without reference to, or incorporation of, the exemptions set forth in 15 U.S.C. §§ 80a-3(b) and (c); provided that, if such investment company is owned, in whole or in part, by other entities, then such investment company, such other entities and the affiliates of such other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities. *See* Section 24.720(h).

[163] *See* Lehman Bros. Petition at 4-5.

[164] *See id.* at 2-4.

earning revenues for at least two years prior to December 31, 1994 to qualify for this provision. While we want to relax the control group equity requirements slightly, we also recognize there may be an incentive for nonqualifiying investors to purchase substantial interests in "preexisting" businesses unless we place some restrictions on those investors. As a practical matter, however, we realize that the identity of noncontrolling investors in such businesses, particularly if they are publicly-traded companies, will change regularly. As we state *infra* in our discussion on the treatment of preexisting businesses that are the sole control group member, we intend that the allowed equity (10 or 20.1 percent) portion should be held by existing investors in such a company although we will not place limits on who qualifies as such an investor. We emphasize, however, that we will scrutinize any significant equity restructuring of preexisting companies that occurs after adoption of our rules. We would presume that any change of equity by an investor in a preexisting company (that is in an applicant's control group) that is five percent or less would not be significant, and the burden is on the applicant to demonstrate whether changes in equity that exceed five percent are *not* significant.

69. We also agree with petitioners and commenters that greater flexibility should be afforded to any applicant whose ownership structures were established before our designated entity requirements were formulated.[165] Therefore, as a further modification, if the sole control group member of an applicant is a business that was in existence and had earnings from operations for at least two years prior to December 31, 1994, we offer the option that control group principals establishing the applicant's status as a minority and/or women-owned business, small or entrepreneurial business may hold 10 percent of the applicant's equity if the 25 percent equity option is used, or a 20 percent equity interest if the 50.1 percent equity option is used.[166] The balance of the control group's equity contribution (*i.e.*, 15 or 30.1 percent) must be held in the form of shares or stock options by any of the following: (1) qualifying principals in the control group; (2) individuals who are members of the applicant's management team (which could include "nonqualifying" individuals); or (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994.

70. The lower equity requirement of 10 percent for preexisting companies that are sole control group members addresses the concerns of these firms, many of which have already undergone successive rounds of financing that may have diluted the qualifying investors' original equity interest in the business. Existing firms that were structured prior to

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[165] *See, e.g.*, BET Petition at 12-15; CTIA Petition at 8-9; EATEL Petition at 2-3; MEANS/SDN Opposition at 10.

[166] As described *supra* at ¶ 65, this equity may be held outright or in the form of options provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of the filing of the short-form application.

the adoption of the entrepreneurs' block regulatory scheme are less likely to become "fronts" for businesses that would not qualify for the entrepreneurs' blocks or the special provisions accorded designated entities. This option is solely intended to accommodate long-standing capital structures of applicants that have already been required to dilute equity ownership to raise capital. Thus, we will require that the portion of equity not held by qualifying principals (15 or 30.1 percent, as the case may be) to be comprised entirely of existing investors of the company (unless the equity is held by management or qualified principals of the control group). As we stated above, we recognize that for many companies, especially those that are publicly-traded, the identities of noncontrolling investors change regularly. Thus, as stated *supra,* we will not place limits on the amount of time a particular individual or entity must have been an investor in the company. We emphasize, however, that we will scrutinize carefully applicants that engage in significant equity reshuffling after adoption of our rules.[167] By giving preexisting applicants additional flexibility, we do not intend to place other applicants at a competitive disadvantage by permitting greater capital infusion from institutional investors.[168]

71. In implementing our requirements, we will provide that where the interests in question are not held directly in the applicant, a multiplier will be used to calculate the effective interests held by the control group principals toward fulfillment of the minimum equity requirement. In addition, we will use a multiplier to calculate the interests of noncontrolling investors in the control group so as to assess compliance with the 25 percent nonattributable equity limit.[169] A multiplier is a traditional tool used by the Commission to calculate the effective ownership levels of investors that, through one or more intervening

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[167] As stated *supra* at ¶ 68, we will presume that a change in equity by an investor (in a preexisting business) of five percent or less is not significant, and the burden is on the applicant to demonstrate whether equity changes above five percent are *not* significant.

[168] *See* BET *ex parte* comments, filed Nov. 3, 1994, at 2-4.

[169] We illustrate the application of a multiplier as follows: If a member of a minority group or a woman holds a 25 percent equity interest in a corporate member of the control group and that corporation holds a 25 percent equity interest in the applicant, the effective interest for purposes of assessing compliance with the minimum equity requirement would be 6.25 percent (*i.e.*, 0.25 x 0.25 = 6.25). This falls well below the 25 percent requirement of our original rule. Correspondingly, if a noncontrolling (and nonqualifying) investor holds a 40 percent interest in a corporate member of a control group and that corporation holds 25 percent of the applicant's total equity, the effective interest held in the applicant by the investor would be 10 percent (*i.e.*, 0.25 x .40 = 10.00). If that same investor also owns more than 15 percent of the applicant's equity outside of the control group, it would exceed the 25 percent nonattributable equity limit.

corporations, hold indirect interests in a licensee.[170]

72. Additionally, in a written *ex parte* presentation, Metricom requests that we exempt small, publicly-traded corporations with widely dispersed voting stock ownership from our control group requirement.[171] Metricom contends that the control group concept is unworkable for small, publicly-traded companies, because it would not be possible to identify a group of shareholders that own 50.1 percent of the corporation's voting stock.[172] As a result, such corporations could be unable to establish eligibility for the entrepreneurs' blocks, or status as a small business. Metricom proposes a test for identifying small, publicly-traded corporations with widely dispersed voting stock ownership that closely follows guidelines used by the Securities and Exchange Commission.[173]

73. We will adopt Metricom's proposal, and create a limited exemption from the control group requirement for small, publicly-traded corporations with widely dispersed voting stock ownership. As Metricom points out, a significant number of small, publicly-traded companies have such widely dispersed voting stock ownership that no identifiable control group exists or can be created.[174] Without a control group, such companies may not be able bid for entrepreneurs' block licenses or qualify for small business status even though their gross revenues and assets meet our financial caps. It was not the Commission's intent that these companies be denied the opportunity to bid on the entrepreneurs' block, or to qualify for treatment as a small business.

74. Consistent with Metricom's proposal, a small, publicly-traded corporation will be found to have dispersed ownership of voting stock if no person (including any "group" as

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[170] *See, e.g.*, 47 C.F.R. § 73.3555 Note 2(d) (indicating that attribution ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by a party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain). We note that the multiplier used here does not employ the 51 percent control exception used in the broadcast context since we are using a multiplier only to determine a control group member's equity investment, not whether such member has control or substantial influence over the applicant.

[171] Metricom, Inc. *ex parte* comments, filed Oct. 20, 1994.

[172] *Id.* at 6-7.

[173] *Id.* at 10-11.

[174] *See id.* at 6-7.

that term is used in the Securities Exchange Act of 1934)[175] has the power to control the election of more than 15 percent of the corporation's directors. In addition, we will require that no person shall have an equity interest in the applicant of more than 15 percent, which is consistent with our revised equity requirements for small business applicants utilizing a control group. Under those requirements, discussed *supra* at paragraph 64, small business principals in an applicant's control group must hold at least a 15 percent interest in the applicant (in combination with an additional, 10 percent equity interest that may come from "nonqualifying" sources). A 15 percent equity requirement is appropriate here because the same percentage of equity is needed for a small business applicant's control group to satisfy its equity obligations (unless it is a preexisting company), and because a 15 percent equity cap is likely to ensure that no control questions arise. We emphasize that this control group exemption will only apply to an applicant or licensee that is not controlled by any entity or group other than corporate management, as should be the case where there is no identifiable group of shareholders holding a controlling interest in the company's voting stock. A small corporation that has dispersed voting stock ownership and no controlling affiliates will therefore not be required to aggregate with its own revenues and assets the revenues and assets of management and shareholders for purposes of entrepreneurs' block eligibility or small business status.

75. Small, publicly-traded corporations that choose to exempt themselves from the control group requirement must own all the equity and voting stock of the applicant or licensee. We find their ability to rely on the corporation's existing capital structure to introduce new passive investment on an ongoing basis provides a level of flexibility that is comparable to applicants/licensees with an identifiable control group. We note that minority and/or women-owned businesses would not qualify for this exemption since a control group is necessary to determine whether the applicant is controlled by minorities or women.

76. Finally, we consider a few other points. First, as BET requests, we clarify that an individual can be the control group of an applicant, so long as our equity requirements and other provisions are satisfied. In response to Lehman Brothers' concerns, we clarify the control group requirements to provide that control group investors must receive dividends, profits, and regular and liquidating distributions in proportion to their actual possession of equity holdings, rather than in proportion to their interest in the total equity (which may include options not yet exercised). Finally, we see no conflict in our rules with a Pacific Telesis' proposal to allow designated entities and their partners to allocate amongst

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[175] *See id.* at 10-11; *see also* 15 U.S.C. § 78(a) *et seq.* (Section 13(d) and Section 13(g) state that "when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities in an issuer, such syndicate or group shall be deemed a 'person' and therefore required to make the disclosures indicated in those subsections").

themselves tax benefits on a non-pro rata basis.[176]

2. *De Facto* Control Issues and Management Contracts

77. In the *Fifth Report and Order*, we provided that the designated entity control group must have *de facto* as well as *de jure* control of the applicant and must be prepared to demonstrate that it controls the enterprise.[177] The requirement of *de facto* control arises from Section 310(d) of the Communications Act, which prohibits any transfer or assignment of license or transfer of control of a corporation holding a license without the Commission's authorization.[178] To help in determining what constitutes a transfer of control under this statutory provision, we follow precedent defining *de facto* control.[179] We also apply this standard in the case of designated entities to determine whether the applicant is in fact controlled by qualifying individuals or entities. Several petitioners seek reconsideration or clarification of our *de facto* control standard, particularly as it applies to questions of *de facto* control by the designated entity control group and use of management contracts by licensees.[180]

a. Definition of *De Facto* Control

78. Background. The *Fifth Report and Order* does not set forth specific guidelines defining *de facto* control in the entrepreneurs' block context. Because issues of *de facto* control are necessarily fact-specific, we have treated the issue as one to be handled on a case-by-case basis.[181] Consequently, a wide variety of factors may be relevant to determining whether a control group has *de facto* control of a particular applicant, applying in the entrepreneurs' blocks.

79. Petitions. Some petitioners ask us to provide more specific guidelines with respect to what does and does not constitute *de facto* control. Omnipoint states that such

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[176] *See* Pacific Telesis *ex parte* comments, dated Oct. 19, 1994, at 4.

[177] *Fifth Report and Order*, FCC 94-178 at ¶¶ 115, 164; 47 C.F.R. § 24.720(k).

[178] 47 U.S.C. § 310(d).

[179] *See Rochester Telephone v. United States*, 23 F. Supp. 634, 636 (S.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 827-828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[180] *See* discussion *infra* at ¶¶ 79, 84.

[181] *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976).

guidelines would help designated entity applicants in setting up their management structure.[182] Others seek assurance that designated entity control groups can meet the *de facto* control test even if they enter into agreements containing "standard" covenants for the protection of non-majority or non-voting shareholders, *e.g.*, supermajority voting requirements for major corporate changes, liquidation preferences (commonly in the form of preferred stock), rights of first refusal, veto rights concerning particular corporate transactions, or the preemptive right to purchase stock to prevent dilution.[183]

80. Decision. We continue to believe that determinations of *de facto* control for purposes of determining designated entity eligibility for entrepreneurs' blocks are inherently factual and therefore will require case-by-case determination. Nevertheless, to provide a level of certainty for designated entities and to ensure that designated entities maintain *de facto* control, we believe it is appropriate to articulate some guidelines for defining *de facto* control in this context. We therefore clarify that a designated entity or entrepreneurs' control group must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the control group must constitute or appoint more than 50 percent of the board of directors or partnership management committee; (2) the control group must have authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; (3) the control group must play an integral role in all major management decisions; and (4) in the case of applicants controlled by minorities and women, at least one minority or female control group member must have senior managerial responsibility over day-to-day operations, *e.g.*, as President or CEO of the licensee.[184] We emphasize, however, that these criteria are guidelines only and are not necessarily dispositive of the issue of *de facto* control in all situations. Even where these criteria are met, therefore, the determination of whether *de facto* control exists will depend on the totality of circumstances in the particular case.

81. With respect to provisions benefitting non-majority or non-voting shareholders, we recognize that inclusion of such provisions is a common practice to induce investment and

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[182] Omnipoint Petition at 11-12.

[183] *See* Media Communications Partners *ex parte* comments, filed October 11, 1994; Pacific Telesis *ex parte* comments, filed October 19, 1994.

[184] These same four indicia will be used to determine whether the "qualified" members of the control group (*i.e.*, women, minorities, and small business or entrepreneurial principals) have *de facto* control over the control group. For example, in a women-owned limited partnership applicant with one corporate general partner, the women shareholders of that corporation must constitute, or be able to appoint more than 50 percent of the board, appoint, promote, demote and fire senior executives, play an integral role in all major management decisions, and at least one of the women must have senior managerial responsibility over day-to-day operations.

ensure that the basic interests of such shareholders are protected. For example, many corporations require a supermajority of shareholders to approve major corporate decisions such as taking on additional debt, significant corporate acquisitions, or issuance of new stock. Similarly, strategic investors making large passive equity contributions to a company frequently insist on a right of first refusal exercisable in the event that a third party seeks to purchase the company. We agree with petitioners that allowing such provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability.[185] We believe, however, that precedent provides guidance in determining the appropriate extent to which these safeguards may protect investment.[186] We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control.[187] Such decisions generally include: (1) issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; (5) sale of major corporate assets; and (6) fundamental changes in corporate structure, including merger or dissolution.[188] We also clarify that non-majority or non-voting investors may hold rights of first refusal, provided that right is exercisable only to prevent dilution of the investor's interest or a transfer of control by the control group to a third party. We also observe that we would not look favorably upon an assignment or transfer of a license that resulted from rights of first refusal being exercised if (1) the holder of such rights was a manager of the licensee, and (2) there was evidence the manager had not acted to maximize the profitability

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[185] *See* note 183 *infra.*

[186] *See* GO Communications *ex parte* comments, filed Nov. 3, 1994, at 5-6.

[187] *See, e.g., News International*, 97 FCC 2d 349, 357-66 (1984) (describing minority shareholder voting and consent rights that serve to protect interests and do not constitute a transfer of control); *Data Transmissions*, 44 FCC 2d 935, 936-37 (1974) (same).

[188] Our most recent decision on such voting and consent rights addressed an agreement between MCI Communications Corporation (MCI) and British Telecommunications plc (BT). In that *Order,* we evaluated whether particular voting and consent rights intended to protect BT's investment in MCI triggered a transfer of control. *See Declaratory Ruling and Order*, 9 FCC Rcd 3960 (1994). We indicated that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) of the Communications Act. We found it significant, however, that while BT could block certain major transactions by MCI, BT could not compel MCI to engage in such major transactions. Thus, we concluded that BT's power was permissibly limited to protecting its own investment in MCI. *Id.* 9 FCC Rcd at 3962. *See also McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (Com. Car. Bur. 1989).

of the business in order to ensure that the options would be exercised at a lower price.

82. While we conclude that the provisions described above will generally not be considered to deprive an otherwise qualified control group of *de facto* control, some proposals made by petitioners and commenters to benefit non-majority shareholders would violate this standard. For example, non-majority shareholders should not have the power to select or replace members of the control group or key employees of the corporation. Further, as discussed in the *Second Report and Order* in this docket, we do not intend to restrict the use of preferential dividends and liquidation preferences. We will scrutinize, however, any mechanisms that deprive the control group of the ability to realize a financial benefit proportional to its ownership of the applicant.[189] Finally, we emphasize that any final determination of whether a control group has yielded *de facto* control to outside investors must depend on the circumstances of the particular case. For example, while certain provisions benefitting non-majority investors may not give rise to a transfer of control when considered individually, the aggregate effect of multiple provisions could be sufficient to deprive the control group of *de facto* control, particularly if the terms of such provisions vary from recognized standards.[190] To facilitate review of such provisions, we will amend the Form 401 (long-form)[191] to require winners of C and F block auctions to disclose any such covenants and terms that protect non-majority investors' rights in the licensee.

b. Management Contracts

83. Background. An issue of concern to many petitioners and commenters is whether designated entities may enter into management agreements with third parties without being deemed to have engaged in an unauthorized transfer of control. Although we did not expressly address this issue in the *Fifth Report and Order*, we have traditionally scrutinized common carrier management agreements for this purpose under the *Intermountain Microwave*

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[189] *See Second Report and Order,* 9 FCC Rcd 2348 at ¶ 278.

[190] In assessing whether such provisions vary from recognized standards, the Commission may assess whether the provisions are accepted measures to protect financial interests of noncontrolling investors. *See, e.g.*, discussion *supra* at paragraph 81 and *infra* at paragraphs 94-95; Model Business Corporations Act and Uniform Limited Partnership Act.

[191] FCC Form 600 will replace both Form 401 (used under Part 22 of the Commission's Rules) and Form 574 (used under Part 90 of the Commission's Rules). *Third Report and Order* in Gen. Docket No. 93-252, FCC 94-212 (released September 23, 1994) at ¶ 286. Applicants must use Form 600 beginning January 2, 1995. *Id.* ¶¶ 298, 414. The Commission has received a Motion for Stay of the January 2, 1995 effective date, which is currently pending. National Association of Business and Educational Radio, Inc., *Motion for Partial Stay of the Third Report and Order* in Gen. Docket No. 93-252, filed November 4, 1994.

test,[192] and we recently extended the use of this test to all CMRS providers in our *Fourth Report and Order* in Gen. Docket 93-252.[193] Under this test, a licensee may enter into a management agreement with a third party provided that the licensee retains exclusive responsibility for operation and control of the licensed facilities, as determined by the following six factors: (1) unfettered use of licensed facilities and equipment; (2) day-to-day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of profits from operation of the licensed facilities.[194]

84. Petitions. In its petition, Pacific Bell contends that the *Intermountain Microwave* test needs to be clarified to eliminate uncertainty about the permissible scope of management agreements.[195] Pacific Bell notes that the D.C. Circuit has recently remanded a case in which the Commission purportedly misapplied the *Intermountain* test and argues that further guidance from the Commission is therefore needed to prevent sham agreements between designated entities and third party managers.[196] Other parties also support the view that the Commission should clarify its standards regarding management contracts, but do not necessarily agree about what standard should be articulated. NABOB, for example, argues that the *Intermountain* test is too rigid and that a more flexible standard should be applied to designated entities who enter into management agreements.[197] Columbia PCS, on the other hand, contends that the Commission should apply a stricter standard by limiting managers to performing discrete functions on a subcontractor basis as opposed to assuming broad

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[192] *See Intermountain Microwave, Inc.*, 24 Rad. Reg. (P&F) 983 (1963) (*Intermountain Microwave*). *See also Memorandum Opinion and Order* in CC Docket No. 90-257 *(La Star Cellular Telephone Company)*, FCC 94-299 (adopted Nov. 18, 1994; released ____) (on remand from the D.C. Circuit).

[193] *Fourth Report and Order*, Gen. Docket No. 93-252, FCC 94-270 (released Nov. 18, 1994) ¶ 20. In this order, we also concluded that management contracts could be considered "attributable interests" for purposes of the PCS/cellular/SMR spectrum cap even if they did not confer control under the *Intermountain Microwave* standard. This conclusion applies only for spectrum cap purposes, however, and does not affect our underlying analysis of when a management contract gives rise to an unauthorized transfer of control. *Id.* at ¶ 25.

[194] *Intermountain Microwave*, 24 Rad. Reg. at 984.

[195] Pacific Bell Petition at 9.

[196] *Id.* at 11-12 (*citing Telephone and Data Systems v. FCC*, 19 F.3d 655 (D.C. Cir. 1994), *vacating and remanding La Star Cellular Telephone Co.*, 7 FCC Rcd 3762 (1992)).

[197] NABOB Petition at 7.

responsibility for system management.[198]

85. Decision. As noted above, we have recently held in Gen. Docket 93-252 that the *Intermountain Microwave* standard applies to all CMRS licensees who enter into management contracts. Because we have determined that broadband PCS licensees will be presumptively classified as CMRS providers,[199] we reaffirm the applicability of the *Intermountain* standard here. We disagree with NABOB's view that this standard is not sufficiently flexible to account for the management needs of designated entities. The six *Intermountain* factors provide reasonable benchmarks for ensuring retention of control by the licensee while allowing for full consideration of the circumstances in each case. In the case of designated entity applicants, they will ensure that designated entities participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well. We believe that relaxing the *Intermountain* standard, by contrast, could give rise to sham agreements in which designated entities do not exercise actual control.

86. While we reject the view that scrutiny of management contracts should be relaxed, we also disagree with the view that such contracts should be subject to a stricter standard than we have applied previously. We conclude that limiting managers to discrete "subcontractor" functions, as Columbia PCS proposes, could prevent designated entities from drawing on managers with broad expertise.[200] Moreover, whether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee.

3. Attribution Rules

a. Voting Equity

87. Background. The *Fifth Report and Order* provided that an investor may hold a 25 percent passive equity interest in the entrepreneurs' block applicant before its interest is attributable for purposes of our eligibility rules.[201] In addition, the passive equity investment for closely-held companies could include no more than five percent voting equity, while

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[198] Columbia PCS Opposition to Petitions for Reconsideration (Columbia PCS Opposition), filed Sept. 9, 1994, at 5-6.

[199] *See Second Report and Order*, Gen. Docket No. 93-252, 9 FCC Rcd 1411 (1994) at ¶ 119.

[200] *See e.g.* NABOB Petition at 7-8; Pacific Bell Reply Comments (Pacific Bell Reply), filed Sept. 27, 1994, at 1-3; AIDE Opposition to Petitions for Reconsideration (AIDE Opposition), filed Sept. 9, 1994, at 8.

[201] *Fifth Report and Order*, FCC 94-178 at ¶ 158.

publicly-traded companies could include no more than 15 percent voting equity.[202] In a subsequent *Order*, we increased the threshold percentage of non-attributable voting equity from five percent to 15 percent for closely-held companies.[203] Similarly, for the alternative equity option available to women and/or minority principals, the 49.9 percent passive investment could include no more than 15 percent voting equity.

88. Petitions. Petitioners request that the Commission increase the threshold percentage of non-attributable voting equity from 15 percent to an amount ranging from 20 percent to 49 percent.[204] In addition, petitioners request that the Commission clarify whether the existing rules permit nonattributable investors outside of the control group to hold a less than 25 percent or a less than or equal to 25 percent equity interest in the applicant.[205] Also, on reconsideration of our *Order on Reconsideration* (discussed *supra*), parties have debated our decision to raise the voting equity threshold for closely-held applicants from five to 15 percent.[206] AIDE argues that raising the voting level of closely-held applicants is imprudent because it increases the likelihood that big business will control the applicant.[207] AMP disagrees with AIDE that 15 percent voting control would increase the likelihood of shams, because 15 percent is still not a controlling percentage.[208] Rather, AMP argues that increasing the permissible level of voting equity will enable applicants to attract more equity financing, thereby increasing the applicant's likelihood of success.[209]

89. Decision. We amend our attribution rules to raise the voting equity threshold that qualifies an investor as having an attributable interest in an applicant to 25 percent. We will raise the voting equity level for both publicly-traded and closely-held corporations, and will apply the 25 percent threshold for the 25/75 percent equity option available to all

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[202] *Id.* at ¶¶ 158, 163.

[203] *Order on Reconsideration*, FCC 94-217 at ¶ 8-10.

[204] Omnipoint Petition at 10 (20 percent); CTIA Petition at 6 (25 percent); BET Petition at 14-15 (25 percent); Pacific Telecom Cellular, Inc. Petition for Reconsideration, filed Aug. 22, 1994, at 4 (49 percent).

[205] CTIA Petition at 6, n. 9

[206] *See* AIDE Petition for Reconsideration of *Order on Reconsideration* (filed Sept. 21, 1994); AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* (filed Oct. 17, 1994).

[207] *See* AIDE Petition for Reconsideration of *Order on Reconsideration* at 4.

[208] AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* at 3-4.

[209] *Id.* at 4.

applicants and to the 49.9/50.1 percent equity option additionally available to minority and/or women applicants. We observe that 25 percent is the percentage suggested by both CTIA and BET.[210] We agree with CTIA that investors will be more likely to invest in new companies if they have the ability to protect their investment through increased voting rights.[211] We also agree that a 25 percent voting interest will not convey a significantly greater risk of control than a 15 percent voting interest.[212] BET asserts that higher voting thresholds will enable a larger number of existing companies -- those which have established financial structures with a higher percentage of voting stock owned by noncontrolling stockholders -- to compete in the entrepreneurial block. Furthermore, in other contexts, Congress has used a 25 percent threshold as a measure of determining control. For example, under Section 310(b) of the Communications Act, foreign companies are permitted to directly or indirectly control up to 25 percent of CMRS licensees.[213] We believe that in this context as well, a 25 percent threshold strikes an appropriate balance between the need to encourage investment and our goal of ensuring that designated entities remain in clear control. Finally, for purposes of clarification, the maximum permissible nonattributable equity level may be no greater than 25 percent of the applicant's total equity and includes the right to vote such shares (*e.g.*, through voting trusts or other arrangements).[214]

90. Additionally, however, to discourage large investors from circumventing our equity limitations for nonattributable investors, we clarify that persons or entities that are affiliates of one another, or that have an "identity of interests," will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our maximum nonattributable equity limits. We will aggregate their ownership interests in calculating their total equity interests in the applicant and in determining whether their gross revenues and assets will be attributed to the applicant. Thus, for example, if two entities form a joint venture or consortium to apply for broadband PCS A and B block licenses, they have an identity of interests that is characteristic of affiliates,

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[210] CTIA Petition at 6; BET Petition at 14-15.

[211] CTIA Petition at 6.

[212] *Id.* *See also* AMP Opposition to Petition for Reconsideration of the *Order on Reconsideration* at 3-4. *But see* AIDE Petition for Reconsideration of *Order on Reconsideration* at 4 (likelihood of abuse of nonattributable investor rule becomes greater if big business permitted to acquire 15 percent of voting stock of closely-held applicant).

[213] 47 U.S.C. § 310(b)(4); *see* CTIA Petition at 6-7. *See also* 22 C.F.R. § 122.1 - 122.2 (Office of Thrift Supervision regulation, which defines control as representing more than 25 percent of the voting stock).

[214] For example, an investor holding 25 percent of an applicant's voting stock will not be considered a nonattributable equity investor if it also has the right, through a voting trust or other arrangement, to vote additional shares.

and will be treated as a single entity when investing in the same entrepreneurs' block applicant.[215] Consequently, under our rules we would aggregate all equity investments in the applicant and count it as a single, possibly attributable investment in the applicant where such investors have an identity of interests.

b. Ownership Interests

91. Background. The *Fifth Report and Order* states that ownership interests are to be calculated on a fully diluted basis and that all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder have been fully exercised.[216] Designated entities are required to disclose any business five percent or more of whose stocks, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant.[217]

92. Petitions. Petitioners and *ex parte* commenters request that we clarify our rules regarding the treatment of various ownership instruments such as warrants, stock options and convertible debentures.[218] Additionally, commenters have asked whether rights of first refusal are considered options and how stock "calls" and "puts" will be treated.[219] A "put" option gives the holder the right to sell a share of stock at a specified price at any time up to the expiration date. Conversely, a "call" option gives the holder the right to buy a share of stock at a specified price, known as the "exercise price."

93. Decision. In general, we will treat stock options as fully exercised with the exception of some ownership instruments discussed *infra* at paragraphs 95-96. We recognize that some forms of options are common and often beneficial to the management of a company. Many companies, for example, include stock options in senior management compensation packages. We also recognize that treating options as fully exercised will encourage companies to hire minorities and women for top management positions, because any options they receive will count toward the equity eligibility requirement.

94. We decide that for purposes of calculating ownership interests, however, some

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[215] *See* 47 C.F.R. § 24.720(1)(3); *see also* 47 C.F.R. § 24.204 note 1.

[216] *See Fifth Report and Order*, FCC 94-178 at ¶ 158 n.133.

[217] *See* 47 C.F.R. § 24.813(a)(1)) (Form 175 and Form 401 application requirements).

[218] *See, e.g.,* Terry Rakolta *ex parte* comments, filed Oct. 4, 1994, at 2; Pacific Telesis *ex parte* comments, filed Oct. 25, 1994, at 2-4; Airtouch *ex parte* comments, filed Oct. 12, 1994, at 4-6; Fleischman and Walsh *ex parte* comments, filed Aug. 10, 1994, at 2.

[219] *See e.g.* BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2; Pac Tel *ex parte* comments, filed Oct. 19, 1994, at 5-6.

ownership instruments will not be treated as "fully diluted," or will not be considered options generally. For example, we will not consider rights of first refusal as options when calculating ownership interests.[220] Rights of first refusal differ from other types of options because they cannot be exercised unless there is a proposed sale to a third party. Sales and transfers to third parties are restricted during the holding period, so rights of first refusal do not threaten the composition of designated entities.[221] At the end of the five-year period, it will still be the designated entity's decision as to whether to sell the business, which ensures that the designated entity controls the decision whether to sell. We agree that without these rights, investors are likely to shy away from investing in designated entities.[222] As Pacific Telesis and BellSouth point out, rights of first refusal are a valued safeguard mechanism because they give investors some control over the entry of new business associates.[223] They also enable investors to prevent their own shares from becoming diluted as a result of a sale.

95. "Put" options held by the designated entity -- which can be realized only after the licensee can permissibly transfer the license -- will not be treated as fully diluted for purposes of determining ownership interests. Put options held by the designated entity leave the ownership decision in the designated entity's control and do not force an unwanted sale upon the designated entity.[224] We observe, however, that while such options will not be factored in for purposes of determining *de jure* control, we will continue to look at whether put options in combination with other terms to an agreement deprive an otherwise qualified control group of *de facto* control over the applicant. Thus, a "put" in combination with other terms to an agreement may result in an applicant not retaining *de facto* control. For example, if an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (*e.g.*, 15 year-term, no payments of principal or interest for six years) and (2) that the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell (*e.g.*, six years after issue, option to put partnership interest in lieu of payment of principal and accrued interest on loan), we

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[220] A "right of first refusal" is an agreement between parties which grants an investor the right to match a purchase offer from a third party.

[221] *See* 47 C.F.R. § 24.839 (d) (restrictions on assignment or transfer of control of C and F block licensees). In any event, the Commission would have to approve any sale or transfer that would result from a noncontrolling investor exercising a right of first refusal.

[222] *See* The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

[223] Pacific Telesis *ex parte* comments, filed Oct. 19, 1994, at 5; *See also* BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2 ("right of first refusal is necessary so each partner can preempt sale to outsider who may not be a desirable partner for strategic or other business reasons").

[224] *See* The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

may conclude that *de facto* control has been relinquished. "Call" options held by investors will be considered exercised immediately to calculate ownership levels because they can be used to force a designated entity to sell its ownership interests. Finally, we observe that such a call option would vest an impermissible degree of control in the applicant's so-called "noncontrolling" investors.

96. In summary, agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules. We will look at the totality of circumstances in each particular case. We emphasize that our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.

D. Special Provisions For Designated Entities

1. Bidding Credits

97. Background. In the *Fifth Report and Order*, we determined that bidding credits were necessary to better ensure that women and minority-owned businesses and small businesses have meaningful opportunities to participate in broadband PCS. [225] Accordingly, our rules provided that small businesses will receive a 10 percent credit, women and minority-owned businesses will receive a 15 percent credit, and small businesses owned by women and minorities will receive an aggregate credit of 25 percent.[226] Our decision in the *Fifth Report and Order* to enhance the effectiveness of the entrepreneurs' blocks through the addition of bidding credits reflected our expectation that broadband PCS will be a capital intensive undertaking. We stated that bidding credits would function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, would directly address the obstacles to raising capital encountered by small, women and minority-owned firms.[227]

98. Petitions. Several petitioners request that we increase the level of bidding credits. For example, while some petitioners argue in favor of higher bidding credits for all designated entities,[228] others seek to raise the bidding credit for women and minority-owned businesses,[229] or only for minority-owned small businesses.[230] Many of these petitioners find

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[225] *Fifth Report and Order*, FCC 94-178 at ¶ 130.

[226] *See* 47 C.F.R. §§ 24.712(a)-(c).

[227] *Fifth Report and Order*, FCC 94-178 at ¶ 131-132.

[228] *See, e.g.*, USIMTA/USIPCA Petition at 6-7 and NPPCA Petition at 4-6 .

[229] *See* Hernandez Petition at 3-4 and BET Petition at 1-2, 9-12.

support in our *Third Memorandum Opinion and Order* in this docket, where we raised the bidding credit for minority and women-owned businesses bidding on regional narrowband PCS licenses from 25 percent to 40 percent.[231] Two petitioners contend that rural telephone companies should receive a 10 percent bidding credit, that would be cumulative with any other bidding credits for which the applicant would be eligible.[232] Finally, consistent with its argument that the entrepreneurs' blocks should be abolished, GTE supports availability of bidding credits across all broadband PCS channel blocks.[233]

99. Decision. We will retain our existing bidding credit scheme. Present levels of bidding credits, coupled with other provisions directed at the capital formation problems of designated entities, such as size limitations on the entrepreneurs' block and installment payments, are sufficient to achieve our regulatory objectives.[234] Moreover, additional measures that we have adopted on reconsideration, including elimination of the limits on personal net worth and relaxation on the attribution of affiliates owned and controlled by minorities, will further enhance the value of the bidding credits to women and minority-owned firms in particular. We find that our action on reconsideration of the narrowband PCS auction rules does not dictate raising the bidding credit in this instance. As the *Third Memorandum Opinion and Order* makes clear, the 40 percent bidding credit for women and minorities bidding on regional narrowband PCS licenses was adopted in the absence of any entrepreneurs' blocks.[235] Further, we state that in the insulated entrepreneurs' block setting, a 25 percent bidding credit for minority and/or women-owned small firms is more appropriate.[236]

100. We also find that the record does not support creation of a new bidding credit for rural telephone companies. In this regard, we agree with BET that petitioners have failed to demonstrate a historical lack of access to capital that was the basis for according bidding

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230 *See* NABOB Petition at 6-7.

231 *Third Memorandum Opinion and Order,* FCC 94-219 at ¶ 58. *See also* 47 C.F.R. § 24.309(b)(2).

232 *See* MEANS/SDN Petition at 9; *accord*, United States Telephone Association Opposition to Petitions for Reconsideration (USTA Opposition), filed Sept. 9, 1994, at 3 n.1. *But see* BET Opposition at 15-17.

233 GTE Petition at 10.

234 *Accord,* Encompass Opposition at 2-3 and United States Small Business Administration Reply Comments (SBA Reply), filed Sept. 16, 1994, at 3-5.

235 *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 87.

236 *Id.*

credits to small businesses, minorities and women.[237] To the extent that a rural telephone company is also a small business, or minority or women-owned, then bidding credits would, of course, be available. We also decline to adopt GTE's scheme to eliminate the entrepreneurs' blocks, and distribute bidding credits throughout the broadband PCS channel blocks. As Omnipoint, Columbia PCS and BET observe, the insulation provided by the entrepreneurs' block is key to the utility of bidding credits in such a capital intensive undertaking.[238]

2. Installment Payments

101. Background. In the *Fifth Report and Order* we made installment payments available to most businesses that obtain entrepreneurs' block licenses. Installment payments directly address the significant barriers that smaller businesses face in accessing private financing.[239] With the expectation of enormous costs associated with obtaining and operating a broadband PCS license, installment payments provide low-cost government financing that reduces the amount of private financing needed before and after the auction.[240] Our installment payment plan was made available to all entrepreneurs' block eligibles granted licenses in the 50 largest BTAs.[241] In the smaller BTAs where the costs of license acquisition and operation are expected to be lower, installment payments are only available to licensees owned by women and minorities, and licensees with less than $75 million in gross revenues.[242] We also provided an "enhanced" installment payment plan for small businesses and businesses owned by women and minorities where interest-only payments were required for such entities for as long as five years from the date of license grant if the firm is both small and owned by women or minorities.[243] By tailoring the deferral of principal payments to the needs of the particular designated entities, we promoted greater participation in broadband PCS by viable competitors.[244]

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[237] BET Opposition at 15-16.

[238] Omnipoint Opposition at 7-12; Columbia PCS Opposition at 2-3; and BET Opposition at 7.

[239] *Fifth Report and Order*, FCC 94-178 at ¶ 135.

[240] *Id.* at ¶ 136.

[241] *Id.* at ¶ 137.

[242] *Id.*

[243] *See generally* 47 C.F.R. § 24.711.

[244] *Fifth Report and Order*, FCC 94-178 at ¶¶ 139-140.

102. Petitions. Vanguard asks us to offer installment payments to all entrepreneurs' block winners for all BTAs.[245] Without this relief, Vanguard contends that small cellular carriers that are, in fact, more likely to serve the smaller markets would be forced to comply with the same payment schedule as large carriers bidding for smaller markets.[246] SBPCS seeks to eliminate interest on installment payments altogether, and limit availability of a installment payment plans to revenues less than $75 million dollars.[247] Hernandez requests that the Commission require bidders to demonstrate their ability to meet the terms of an installment payment plan when the short-form application is filed.[248]

103. Decision. We will extend availability of installment payments to all entrepreneurs' block licensees, regardless of gross revenues. A key factor to the overall success of the entrepreneurs' blocks is the installment payment plan. The installment plan was established to facilitate the entry of small and minority-owned businesses into the broadband PCS market. The top 50 BTAs will be the most competitive wireless communications markets in the country and will require inordinately large amounts of capital. It will be extremely challenging for any entrepreneurs' block participant to compete in these markets. The installment plans will greatly enhance the ability of all entrepreneurs' block participants to raise capital to succeed against major, well-capitalized competitors. As Vanguard points out, disallowing installment payments to large entrepreneurs' block winners of smaller BTAs unfairly restricts these companies from competing for markets in which they will have a logical interest.[249] In addition, the larger entrepreneurs would be forced to pay for BTAs on the same terms as major companies that do not qualify for the entrepreneurs' blocks. While we accept these arguments, and therefore extend installment payments to all entrepreneurs' block licensees, we note that the terms of these payments should be less generous than those extended to smaller companies, less able to access traditional sources of capital. Therefore, we will require entrepreneurs with gross revenues exceeding $75 million to make a post-auction down payment equaling ten percent of their winning bids, but then pay the remaining 90 percent of the auction price in installments with interest charges to be fixed at the time of licensing at a rate equal to that for ten year U.S. Treasury obligations plus 3.5 percent, with payments on both interest and principal required.

104. We decline to reduce or eliminate interest rates entirely because we believe that

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[245] Vanguard Cellular Systems, Inc. Opposition to Petitions for Reconsideration (Vanguard Opposition), filed Sept. 9, 1994, at 2-4.

[246] *Id.* at 4.

[247] Small Business PCS Association Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 2-3.

[248] Hernandez Petition at 5.

[249] Vanguard Opposition at 4.

the present approach achieves the proper balance among our regulatory objectives. In particular, our present tailoring of interest rates to the needs of the designated entity enables licenses to be disseminated to small businesses and furthers the congressional goal of allowing taxpayers to reap a portion of the value of the licenses. Reducing or eliminating interest payments could result in very high bids, which could reduce competition and promote defaults among entrepreneurs. Such an approach could also encourage speculation instead of legitimate applicants who can attract capital. On our own motion, however we will amend 47 C.F.R. § 24.711 to permit small businesses owned by minorities and/or women to make interest-only payments for six years from the date of license grant. Under our current rules, principal payments start to come due at the same time the entrepreneur is permitted to transfer the license and immediately following the first, build-out requirement. By deferring payment of principal an additional year, we intend to assist the designated entity in avoiding an unwanted sale of business at the five-year mark in order to avoid payment of principal. Finally, for the reasons discussed in the *Fourth Memorandum Opinion and Order*, we believe that our existing requirements for broadband PCS auction applicants adequately measure an applicant's ability to pay.[250] We therefore decline to impose more stringent requirements to determine whether an applicant can meet the terms of an installment payment plan.

3. Rural Telephone Company Provisions

105. Background. In the *Fifth Report and Order*, the Commission established several provisions to help rural telephone companies become meaningful participants in the emerging PCS market. In that proceeding, we defined a rural telephone company as a local exchange carrier having 100,000 or fewer access lines, including all affiliates.[251] In departing from the more restrictive definition adopted in the *Second Report and Order*, the Commission stated that the revised definition strikes an appropriate balance by facilitating the rapid deployment of broadband PCS to rural areas, without giving benefits to large companies that do not require special assistance.[252] Qualified rural telephone companies are eligible for broadband PCS licenses through a partitioning system, which permits rural telephone companies to obtain licenses that are geographically partitioned from larger PCS service areas.[253] These companies will be permitted to acquire partitioned broadband PCS licenses in any frequency block in two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in the auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned broadband PCS licenses from

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[250] *Fourth Memorandum Opinion and Order*, FCC 94-246 at ¶ 45.

[251] *Fifth Report and Order*, FCC 94-178 at ¶ 198.

[252] *Id. See also Second Report and Order*, 9 FCC Rcd 2348 at ¶ 282.

[253] *Fifth Report and Order*, FCC 94-178 at ¶ 151.

other licensees through private negotiation and agreement either before or after the auction.[254]

106. Under our rules, if a rural telephone company receives a partitioned license from another PCS licensee in a post-auction transaction, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area. We recognized in the *Fifth Report and Order* that rural telephone companies will require some flexibility in fashioning areas in which they will receive partitioned licenses, so we did not adopt a strict rule concerning the reasonableness of the partitioned area.

107. Petitions. Petitioners variously request the Commission modify our rural telephone company provisions. Century Telephone Enterprises, Inc. (Century) and Citizens Utilities Company (Citizens) argue that the rural telephone company definition adopted in the *Fifth Report and Order* is overly restrictive and excludes local exchange carriers that exceed the access line standard but nevertheless serve predominantly rural areas.[255] Alternatively, Citizens requests the Commission implement waiver procedures.[256] In addition, Hicks and Ragland and TEC urge the Commission to eliminate its partitioned service area limitations, stating that the present rules unnecessarily impede the ability of a rural telephone company to provide service in a technically and economically feasible manner.[257] Finally, MEANS/SDN and TEC contend that rural telephone companies should be afforded the same benefits as other designated entities, including outside passive investment in rural telephone company consortia and bidding credits.[258]

108. Decision. We generally will retain the rural telephone company provisions adopted in the *Fifth Report and Order*. We remain convinced that our definition of rural telephone company, which reflects the views of numerous parties to this proceeding, will ensure that broadband PCS will be deployed rapidly to rural areas. At the same time, it is narrowly tailored to exclude large local exchange carriers that do not require special

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[254] *Id.*

[255] Century Telephone Enterprises, Inc. Petition for Reconsideration (Century Petition), filed Aug. 22, 1994, at 2-7. *See also* USTA Opposition at 2; Telephone and Data Systems, Inc. Opposition to Petitions for Reconsideration, filed Sept. 9, 1994, at 4-5.

[256] Citizens Utilities Company Petition for Reconsideration (Citizens Petition), filed Aug. 19, 1994, at 5-9.

[257] Hicks and Ragland Petition for Reconsideration (Hicks and Ragland Petition), filed Aug. 22, 1994, at 2-5.

[258] MEANS/SDN Petition at 4-9; TEC Petition at 8.

treatment.[259] We observe that we can entertain and grant a waiver request if a local exchange carrier that does not satisfy our rural telephone company definition can meet our waiver standard set forth in Section 24.819 of the Commission's Rules to warrant qualifying the LEC for a partitioned broadband PCS license.[260]

109. We continue to believe that our existing rules, which allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas, will provide a viable opportunity for these entities to successfully acquire PCS licenses and offer service to rural areas.[261] We are confident that the partitioning system articulated in the *Fifth Report and Order* satisfies the directive of Congress to ensure that rural telephone companies have the opportunity to provide PCS services to all areas of the country, including rural areas. In addition, we believe that the other benefits afforded to designated entities, combined with the cellular attribution threshold for rural telephone companies adopted in Gen. Docket No. 90-314, will further ensure that rural areas have expedient access to PCS services.[262]

110. We disagree with MEANS/SDN's contention that modifications to our consortia provisions are needed to fulfill Congress' mandate that rural telephone companies have an opportunity to acquire PCS licenses. As we noted in the *Fifth Report and Order*, we expect that virtually all rural telephone company consortia will be eligible to bid on licenses in Blocks C and F without competition from "deep pocket" bidders.[263] Additionally, if consortia members qualify as small businesses, the Commission will provide the bidding credit and installment payment provisions extended to similarly-situated applicants. Accordingly, we believe it is unnecessary to permit passive equity investments in rural telephone company consortia, as MEANS/SDN request.

111. We also reject TEC's and MEANS/SDN's proposal to extend bidding credits to rural telephone companies even if they are not small businesses or owned by minorities and/or women. We continue to believe that existing benefits for rural telephone companies

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[259] As we noted in the *Second Report and Order*, we do not believe that Congress intended for us to give special treatment to large LECs that happen to serve small rural communities. *See Second Report and Order*, 9 FCC Rcd 2348 at ¶ 196.

[260] *See* 47 C.F.R. § 24.819.

[261] *See Fifth Report and Order*, FCC 94-178 at ¶¶ 148-153.

[262] *See Fifth Report and Order*, FCC 94-178 at ¶ 153 (discussing designated entity eligibility criteria and accompanying benefits); *see also Memorandum Opinion and Order* in Gen. Docket No. 90-314 (*Broadband PCS Reconsideration Order*), FCC 94-144 (released June 13, 1994) at ¶¶ 125-132.

[263] *Fifth Report and Order*, FCC 94-178 at ¶ 153.

will allow them to effectively compete for licenses that serve rural territories. In addition to the partitioning and consortia provisions, we also note that rural telephone companies qualify for significant financial benefits from the Rural Electrification Administration and the Universal Service Fund which, as BET suggests, adequately compensates these entities for the lack of bidding credits.[264] Additionally, we note that our bidding credits were specifically tailored to address the discriminatory market barriers faced by women and minority-owned entities.[265] We concur with BET's assessment that rural telephone companies do not face the same kinds of barriers raising capital.

112. We note that most, if not all, rural telephone companies meet the entrepreneurs' block size standards and are permitted to bid directly on entrepreneurs' blocks licenses. To the extent that a rural telephone company does not qualify for the entrepreneurs' blocks, however, we disagree that it will be forced to negotiate with other licensees that may not be willing to sell their broadband PCS interests in the form of partitioned licenses or other ownership arrangements. On the contrary, we believe that other applicants and licensees will find rural telephone companies attractive entities to negotiate with, because of the efficiencies associated with rural telephone companies existing infrastructure. Additionally, since a licensee will be permitted to assign a portion of its license to a rural telephone company without violating the transfer and holding requirements, we expect that licensees will actively solicit participation by rural telephone companies. For the reasons discussed above, we continue to believe that our existing scheme, which is narrowly tailored to satisfy Congress' mandate, will provide rural telephone companies with a meaningful opportunity to participate in the provision of broadband PCS services and further the objective of rapidly getting service to rural areas.

113. Finally, we dismiss concerns raised by TEC and Hicks and Ragland concerning the permissible size of a rural telephone company's service area. We addressed these concerns in the *Fifth Report and Order* and concluded that a partitioned area containing no more than twice the population of that portion of a rural telephone company's wireline service area provides a reasonable presumption of a permissible service territory.[266] However, we agree that rural telephone companies will require some flexibility in fashioning a partitioned service area and thereby affirm our prior conclusion that a strict rule is not needed.[267]

E. Aggregation of and Holding Period for the Entrepreneurs' Block Licenses

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[264] BET Opposition at 16.

[265] *Id.* at 16-17.

[266] *Fifth Report and Order*, FCC 94-178 at ¶ 151.

[267] *See id.*

a. Single Entity Purchase Limit

114. Background. To ensure that C and F block licenses are disseminated among a wide variety of applicants, our rules as adopted in the *Fifth Report and Order*, restrict the number of licenses within the entrepreneurs' block that a single entity may win at auction.[268] Specifically, we impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. We indicated that the 98 licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. We observed that such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks, while also allowing bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage. We provided that the limit would apply only to the total number of licenses that may be won at auction on the C and F blocks. Furthermore, we indicated that for purposes of this restriction we will consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license at the auction.[269]

115. Petitioners. On reconsideration, the Small Business PCS Association (SBPCS) recommends that the maximum number of entrepreneurs' block licenses purchased by a single entity be limited to licenses that cover no more than a total of 10 percent of the national population, or approximately 25 million "pops." SBPCS expresses concern that the existing limit does not provide for enough diversity of ownership since it would allow a single entity to acquire the top 98 BTA licenses on the 30 MHz entrepreneurs' block.[270]

116. Decision. After considering SBPCS' concerns, we will retain the existing limit, which prevents any single entity from acquiring more than 10 percent of the entrepreneurs' block licenses.[271] We believe that changing the limit to 10 percent of the population or 25 million "pops" rule would be overly restrictive. We note, for example, that successful entrepreneurs will need to form coherent regional "cluster" strategies to compete against large communications companies, such as dominant cellular providers, and that such regional clusters may come together into a national alliance with common technology and marketing strategies, including a common brand name. A 25 million "pops" per entity limit would severely restrict entrepreneurs that win the New York BTA (with 18 million "pops") and the

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[268] *Id.* at ¶¶ 169-171.

[269] *See id.* at ¶¶ 169-171. *See also* 47 C.F.R. § 24.710.

[270] SBPCS Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 4.

[271] *See also* Media Communications Partners, et. al, *ex parte* comments, filed Oct. 11, 1994, at 11-12 (requesting that a designated be limited to acquiring licenses serving no more than 10 percent of the national population, rather than given a maximum of 98 licenses). *But see* BET Petition at 15 (opposing SBPCS' proposal).

Los Angeles BTA (with 15 million "pops") from any meaningful regional cluster strategy, given the size of adjoining markets.[272] In light of this concern, we want to be careful not to impose a restriction that would unfairly disadvantage C and F block new entrants in the new PCS marketplace. We are satisfied that the present limit achieves the proper balance between promoting fair distribution of benefits and ensuring that entrepreneur block winners have enough flexibility to develop competitive systems on a regional and nationwide basis.

b. Restrictions on Transfer or Assignment

117. Background. In the *Fifth Report and Order*, restrictions on the transfer or assignment of licenses were adopted to ensure that designated entities do not take advantage of special entrepreneurs' block provisions by immediately assigning or transferring control of their licenses to non-designated entities. We indicated that the "trafficking" of licenses in this manner would unjustly enrich the auction winners and would undermine the congressional objective of giving designated entities the opportunity to provide spectrum-based services. Thus, our rules prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses during the three years after the date of the license grant.[273] For the subsequent two years (or the fourth and fifth years of the term), the licensee is permitted to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.

118. We also provided that during the five-year period licensees cannot assign an attributable interest in the license that would cause them to exceed the financial eligibility requirements.[274] Additionally, we stated that a transferee or assignee who receives a C or F block license during the five-year holding period will remain subject to the transfer restrictions for the balance of the holding period. Thus, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee. Moreover, we stated that we will conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the Commission's rules.[275]

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[272] *See* Columbia PCS Opposition at 4-6.

[273] *See* 47 C.F.R. § 24.839(d). We indicated that we would consider exceptions to the three-year holding period on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. *See Fifth Report and Order*, FCC 94-178 at ¶ 128 n. 101.

[274] *See* 47 C.F.R. § 24.709(a)(3).

[275] *See* id. at ¶ 128. *See also* 47 C.F.R. § 24.709(d).

119. In the *Fifth Report and Order*, we also adopted rules to prevent entrepreneur block license holders from realizing any unjust enrichment that is gained through a transfer or assignment that occurs during the original license term.[276] Specifically, we provided that if, within the original license term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, must be paid to the U.S. Treasury as a condition of approval of the transfer or assignment.[277]

120. We adopted similar requirements with respect to repayment of installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license during the term of a license to an entity not meeting the applicable eligibility standards, we require payment of the remaining principal and any interest accrued through the date of assignment as a condition of approval of the transfer or assignment. Accordingly, we explained that if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer or assignment of the license. Thus, a higher interest rate and earlier payment of principal may begin to be applied.[278]

121. Petitions. Two petitioners discussed the holding period and limited transfer restrictions imposed on entrepreneurs' block licenses. Specifically, AIDE requests the Commission repeal the five-year holding period, contending that the unjust enrichment provisions (to the extent they promote recovery of bidding credits and installment payments) eliminate the need for such a restriction. AIDE also argues that once a designated entity receives a spectrum-based license, the mandate of Congress to provide these entities with a fair opportunity to provide spectrum-based services is satisfied, and that there is no justification for any further restrictions beyond that point in time. AIDE also wants clarification of how our unjust enrichment provisions will apply if a transfer or assignment

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[276] While we indicated that the five-year holding and limited transfer requirements in the entrepreneurs' blocks limit the applicability of unjust enrichment provisions generally during the first five-years of the license term (*i.e.*, in cases where the license-holder has engaged in a permissible transfer or assignment where the buyer is eligible for comparable bidding credits or is qualified for installment payments), we indicated that such provisions were still useful, particularly since they are applicable for the full ten-year license term. *See Fifth Report and Order*, FCC 94-178 at ¶ 141 n. 119.

[277] *See id.* at ¶ 134. *See also* 47 C.F.R. § 24.712(d).

[278] *See Fifth Report and Order*, FCC 94-178, at ¶ 141. *See also* 47 C.F.R. § 24.711(e).

does occur during the five-year holding period.[279]

122. Additionally, CTIA requests that the Commission amend its transfer restrictions to allow all PCS licensees (including entrepreneurs' blocks and designated entities) to transfer 5 MHz of spectrum immediately after license grant. Alternatively, CTIA asks that transfer be permitted within one year after service is initiated by a new PCS entrant in the relevant PCS service area. CTIA contends that this change is needed to provide cellular carriers with reasonable flexibility to reach the 40 MHz PCS spectrum cap (especially in secondary market transactions), and may increase the value of spectrum at auction (*i.e.*, by providing designated entities with an added source of funding and ensuring that market forces place the spectrum in the hands of those who value it most highly).[280]

123. Decision. We will not modify our five-year holding period and limited transfer restrictions. While AIDE and CTIA ask us to eliminate or significantly relax our restrictions, many commenters generally support the idea of a holding and limited transfer period for entrepreneurs' block licenses.[281] BET, for example, contends that without a holding requirement, the opportunities for circumventing the Commission's rules are increased as non-designated entities weigh the benefits of sacrificing certain preferences (*e.g.*, bidding credits) in exchange for control of a valuable PCS license.[282] Contrary to AIDE's point of view, we believe that unjust enrichment provisions alone do not provide adequate safeguards for ensuring that designated entities retain *de jure* and *de facto* control over their licenses. We are satisfied that the five-year holding period and limited transfer restrictions adopted in the *Fifth Report and Order* are justified for our purposes in meeting our congressional mandate.

124. Additionally we reject CTIA's request to permit 5 MHz of spectrum to be transferred after the license grant because it would contradict our determinations in the PCS service rules docket (Gen. Docket 90-314) concerning the disaggregation of broadband PCS spectrum. In that docket, we decided that no disaggregation of spectrum should be allowed

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[279] *See* AIDE Petition at 17-19.

[280] *See* CTIA Petition at 2-4.

[281] *See* Hernandez, Roland, *ex parte* comments, filed Oct. 11, 1994; NABOB *ex parte* comments, field Nov. 3, 1994, at 2. *Bur see* Pacific Bell Opposition to Petitions for Reconsideration (Pacific Bell Opposition), filed Sept. 9, 1994, at 13 (supporting AIDE's position); The Marshall Company *ex parte* comments, Aug. 3, 1994 (opposing more than a five-year holding period).

[282] BET Petition at 2-3. *See also* Omnipoint Reply Comments (Omnipoint Reply), Sept. 16, 1994, at 2; SBA Reply at 4-5; Hernandez *ex parte* comments (Oct. 14, 1994).

until a broadband PCS licensee had met our five-year construction requirements.[283] We also determined that in-region cellular interests should not be permitted to acquire 10 MHz of broadband PCS spectrum until the year 2000 -- when they would be eligible for an additional 5 MHz of spectrum in their service areas.[284] CTIA's proposal would permit disaggregation sooner than is permissible under our PCS service rules, and should be rejected for reasons that we have previously established.[285]

125. In addition, we wish to clarify the application of our holding rule to our financial caps.[286] As we have stated, under certain circumstances we will allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for the entrepreneurs' block and for small business eligibility. Thus, we will permit entrepreneurs' block licensees to transfer their licenses in years four through five to other entrepreneurs' block licensees even if it would result in growth beyond the permissible gross assets and total revenues caps, as long as it otherwise complies with our control group and equity requirements. We believe this encourages designated entities to grow, instead of penalizing them for their success, which was a concern expressed by some commenters.[287]

126. Further, we clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. Unjust enrichment penalties (as described above) apply if these requirements are not met, or if they qualified for different provisions at the time of licensing. For purposes of determining size eligibility for transfers or assignments that occur between the fourth and fifth years, we will use the most recently available audited financial statements in cases where the entity to whom the license is being transferred did not win a license in the

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[283] *See Broadband PCS Reconsideration Order*, FCC 94-144 at ¶¶ 69-70, *further recon. Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994).

[284] *Id.* at ¶ 67. *See also* 47 C.F.R. § 24.404.

[285] *See Second Report and Order* in Gen. Docket 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order,* 9 FCC Rcd 4441 (1994), *Order on Reconsideration,* 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order,* FCC 94-265 (released Oct. 19, 1994). *See also* BET Petition at 3 (opposing CTIA proposal); McCaw Opposition to Petitions for Reconsideration (McCaw Opposition), filed Sept. 9, 1994, at 2-3 (supporting CTIA proposal).

[286] *See Fifth Report and Order*, FCC 94-178 at ¶ 167 (for a discussion of application of holding rule to the financial caps).

[287] *See, e.g.*, MasTec Opposition to Petitions for Reconsideration (MasTec Opposition), filed Sept. 9, 1994, at 8; MEANS/SDN Opposition at 9-10; Omnipoint at 3.

original entrepreneurs' block auction.

127. AIDE sought clarification concerning the application of our unjust enrichment provisions to our holding period and limited transfer rules. In response to their request, we reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC. With respect to installment payments, we confirm that we expect that when the purchaser is not to an entity that qualifies for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved.

F. Miscellaneous

1. Audits

128. In the *Fifth Report and Order*, we expressed our intention to conduct random pre- and post-auction audits to ensure that designated entities retain *de facto* and *de jure* control of their facilities and licenses and to ensure that all applicants receiving preferences are in compliance with the eligibility requirements.[288] On reconsideration, we clarify on our own motion that the Commission's use of the term "random" in the *Fifth Report and Order* was generic and that the Commission does not intend to limit itself to conducting "random" audits. While random selection for audit may be one, acceptable enforcement technique in some cases, it may not be the most efficient. We expect that audits might also be undertaken on information received from third parties or on the basis of other factors.[289] Since the audit process will involve the application of in-house and contract resources, we intend to pursue a course of audits that will be efficient as well as effective. Consequently, we are amending

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[288] *See Fifth Report and Order*, FCC 94-178 at ¶¶ 117, 128; 47 C.F.R. § 24.709(d). *See also Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 135 (general auction rules); 47 C.F.R. § 1.2110(h); *Third Memorandum Opinion and Order*, FCC 94-219 at ¶¶ 56, 63 (general auction rules and narrowband PCS); 47 C.F.R. § 24.309(d).

[289] While we anticipate that public scrutiny of entrepreneurs' block applications and the petition to deny process, together with audits, will assist the Commission in uncovering potentially unqualified applicants for the entrepreneurs' blocks, we will in no way condone the filing of frivolous complaints or petitions. We will take appropriate action against those who abuse our processes. We also emphasize that the initiation of an investigation by the Commission (whether pursuant to a complaint or on our own initiative) will not result in the suspension of construction or operation of a licensee's facilities pending the outcome of such investigation.

the rules to more fully reflect the variety of circumstances that might lead to an audit. We will also add an audit consent to the FCC short-form and other forms where eligibility must be established. Because the Commission's audit program will cover all auction applications, regardless of the service involved, we will promulgate conforming amendments to Subpart Q in Part 1 of the Commission's regulations in a separate Order.

129. Audits and other enforcement vehicles are a necessary adjunct to a self-certification process to implement the measures to assist designated entities adopted pursuant to Section 309(j) of the Communications Act. To facilitate our audit program and to provide preliminary assurances that those applicants claiming eligibility for such preferences are in compliance with the regulatory requirements concerning ownership and financial status, we will require that applicants list their control group members, affiliates, attributable investors, gross revenues, total assets and other basic ownership and eligibility information in an exhibit to their short-form applications. Additional, more detailed information concerning eligibility will be required of winning bidders. All applicants are required to maintain an updated file of documentary evidence supporting the information and the status claimed. Applicants that do not win the licenses for which they applied, shall maintain such records until final grant of the license(s) in question, or one year from the date of the filing of their short-form applications, whichever is earlier. Licensees shall maintain such records for the term of the license.

2. Defaults

130. Parties have asked questions about how the Commission would resolve issues associated with an entrepreneurs' block licensee becoming financially insolvent. In particular, there is concern about the status of the license when the licensee cannot make the required installment payments, and in the case of when a licensee enters bankruptcy.[290]

131. In the *Second Report and Order*, we clarified that "a designated entity that has defaulted or that anticipates default under an installment payment program" may request a three to six-month grace period before the Commission cancels its license.[291]

> "During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan. We will evaluate requests for a grace period on a case-by-case basis . . . deciding whether to grant such requests or to pursue other measures, we may consider, for example, the licensee's payment history, including whether it has defaulted before and how

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[290] North American Wireless *ex parte* comments, filed Nov. 3, 1994, at 2-3; Nation's Bank and NationsBanc Capital Markets, Inc. *ex parte* comments, Nov. 3, 1994, at 2-3.

[291] *See Second Report and Order*, FCC 94-61 at ¶ 240.

far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under a distress sale policy. Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures."[292]

132. Since several commenters (discussed *supra* at note 287) requested clarification as to what the Commission would allow in the event a licensee defaults on payment of its installment monies, we clarify that lenders and entrepreneurs' block licensees are free to agree contractually to their own terms regarding situations where the licensee has defaulted under the Commission's installment payment program, and possibly other obligations. As long as there is no transfer of control, we would not become involved in the particulars of a voluntary workout arrangement between a designated entity and a third-party lender.

133. Specifically, an entrepreneurs' block licensee and its lenders may agree that, in the event the licensee defaults on its installment payments, the lenders to that licensee will cure this default by assuming the designated entity's payments to the government. Barring any transfer of control, we would not object to such an arrangement.

134. In the event a transfer of control is sought under the terms of the workout, the licensee and its lenders must apply for Commission approval of the transfer, in accordance with Section 310(d) of the Communications Act. In a situation where the lender itself is the proposed buyer or transferee, we would scrutinize such an application to determine whether, by virtue of the loan agreement, an earlier transfer of control was effectuated. We clarify that we would also expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

135. In the event an entrepreneurs' block licensee becomes subject to bankruptcy, our existing rules and precedent clarify how the Commission would dispose of a license in such a circumstance. Specifically, transfer to a bankruptcy trustee is viewed as an involuntary transfer or assignment to another party under Section 24.839 of the Commission's Rules.[293] In such a case therefore, there would be a *pro forma* involuntary assignment of the license to a court-appointed trustee in bankruptcy, or to the licensee, as a debtor-in-possession. Assuming the bankrupt estate is liquidated or the trustee finds a

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[292] *Id.*

[293] In the case of an involuntary transfer, FCC Form 490 shall be filed within thirty days following the event that gives rise to the transfer. *See* 47 C.F.R. § 24.839.

qualified purchaser for the licensee's system, and assuming payments to the Commission are maintained or a grace period granted, we will continue generally to defer to federal bankruptcy laws on many matters.[294] We would, however, ultimately have to approve any final transfer of the license. As stated above, we would expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

136. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Memorandum Opinion and Order* is as follows:

Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, in the *Notice of Proposed Rule Making* in this proceeding and published Final Regulatory Flexibility Analyses in the *Second Report and Order* (at ¶¶ 299-302) and the *Fifth Report and Order* (at ¶¶ 219-222). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

Summary of the Issues Raised by the Public Comments. No commenters responded specifically to the issues raised by the *Fifth Report and Order*. We have made some modifications to the proposed requirements as appropriate.

Significant Alternatives Considered and Rejected. All significant alternatives have been addressed in the *Fifth Report and Order* and in this *Memorandum Opinion and Order*.

B. Ordering Clauses

137. Accordingly, **IT IS ORDERED** that the Petitions for Reconsideration and/or Clarification of the *Fifth Report and Order* in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

138. **IT IS FURTHER ORDERED** that the Petition for Rulemaking filed by David

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[294] *See LaRose v. FCC*, 494 F.2d 1145 (D.C.Cir. 1974). *See also* 47 C.F.R. § 24.839(d)(4).

J. Lieto on September 21, 1994 is hereby **DISMISSED**.

139. **IT IS FURTHER ORDERED** that the Petitions for Reconsideration of the *Order on Reconsideration*, FCC 94-217, adopted in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

140. **IT IS FURTHER ORDERED** that Part 24 of the Commission's Rules **IS AMENDED** as set forth in Appendix B.

141. **IT IS FURTHER ORDERED** that these rule changes made herein **WILL BECOME EFFECTIVE** sixty (60) days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

142. **IT IS FURTHER ORDERED** that the appropriate Bureau, in consultation with the Managing Director, is delegated authority to revise FCC Forms 175, 401 (and any successor forms) and to modify and create any additional forms to ensure that PCS applicants are in compliance with the requirements set forth in Parts 1 and 24 of the Commission's Rules, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

List of Parties who Filed Petitions for Reconsideration of the *Fifth Report and Order* in PP Docket 93-253

American Personal Communications (APC)
Association of Independent Designated Entities (AIDE)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Century Telephone Enterprises, Inc. (Century)
Citizens Utilities Company (Citizens)
Columbia PCS, Inc. (Columbia PCS)
Cook Inlet Region, Inc. (Cook Inlet)
EATELCORP, Inc. (EATEL)
GTE Service Corporation (GTE)
Hernandez, Roland A. (Hernandez)
Hicks and Ragland Engineering Company, Inc. (Hicks and Ragland)
Karl Brothers, Inc. (Karl Brothers)
Lehman Brothers (Lehman)
MasTec, Inc. (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Metrex Communications Group, Inc. (Metrex)
Minnesota Equal Access Network Services, Inc. and
South Dakota Network, Inc. (Joint) (MEANS/SDN)
National Association of Black Owned Broadcasters, Inc. (NABOB)
National Paging and Personal Communications Association (NPPCA)
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (Pacific Bell)
Pacific Telecom Cellular, Inc.(PTC)
Small Business PCS Association (SBPCS)
Telephone Electronics Corporation (TEC)
United States Interactive & Microwave Television Association (USIMTA)

Oppositions filed in Response to Petitions for Reconsideration

Association of Independent Designated Entities (AIDE)
American Personal Communications (APC)
BET Holdings, Inc. (BET)
Columbia PCS, Inc. (Columbia)
Cook Inlet Region, Inc. (Cook)
DCR Communications, Inc. (DCR)
Encompass, Inc. (Encompass)

Mankato Citizens Telephone Co. (Mankato)
MasTec (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (PacBell)
Personal Communications Industry Association (PCIA)
Telephone and Data Systems, Inc. (TDS)
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)

Replies filed in Response to Petitions for Reconsideration

BET Holdings, Inc. (BET)
City of Dallas (Dallas)
GO Communications Corporation (formerly Columbia PCS, Inc.) (Columbia PCS)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Equal Access Network Services, Inc.
and South Dakota Network, Inc. (Minnesota)
National Paging & Personal Communications Association (NPPCA)
Omnipoint Communications (Omnipoint)
Small Business Administration (SBA)

Ex parte* filings in Response to *Fifth Report and Order

Airtouch Communications (Airtouch)
Allied Communications, L.P.
Bachow & Associates
Bastion Capital Fund, L.P., LM Capital Fund II, L.P.
BellSouth Corporation (BellSouth)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Columbia PCS/Go Communications (Columbia/GO)
Columbus Grove Telephone Co. (CGTC)
Comcast Corp. (Comcast)
Congress of the United States
Cook Inlet Communications (Cook Inlet)
Cox Enterprises, Inc. (Cox)
DCR Communications (DCR)
EATELCORP, Inc. (EATEL)
Encompass, Inc. (Encompass)
Fidelity Capital
Fleischman and Walsh (F&W)
GTE Service Corporation (GTE)

Gurman et al. (Gurman)
Hart Engineers (Hart)
Hernandez, Roland, Interspan Communications, Corp.
Impulse Telecommuncations, Corp. (Impulse)
In-Flight Phone International (In-Flight)
Jordan, Vernon E.
Kraskin & Associates (Kraskin)
Lehman Brothers (Lehman)
Marshall Company (Forming New Communications Services, Inc. [NEWCOM])
MasTec, Inc. (MasTec)
Media Communications Partners (Providence, Fleet Equity, Spectrum)
Metro-Sound, USA (L.A. Sound)
Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
Minority Media Ownership & Employment Council (MMOEC)
Montgomery Securities (Montgomery)
NationsBank and NationsBanc Capital Markets, Inc. (NationsBank)
North American Wireless, Incorporated
Murray, James B. Jr.
National Rainbow Coalition
Omnipoint Corporation (Omnipoint)
Pacific Bell (Pac Bell)
Pacific Telesis
Rakolta, Terry
Skadden, Arps, Slate, Meagher & Flom
Small Business Administration (SBA)
Small Business Advisory Committee (SBAC)
Small Business PCS Association (SBPCSA)
Telephone Electronics Corporation (TEC)
Unterberg Harris
U.S. Intelco Networks, Inc. (USIN)
Utilities, Inc. (Utilities)
Vanguard Cellular Systems, Inc. (Vanguard)
Venture Capital Representatives: The Carlyle Group, Daniels & Associates, Fleet Equity Partners, Madison Dearborn, MC Partners, Providence Ventures Inc., Spectrum Equity Investors. (Venture Capital Representatives)
Wiley, Rein & Fielding

Appendix B

Amended Rules

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended in Subpart H and I as follows:

1. Section 24.709 is revised to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) General Rule.

(1) No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates*, have *gross revenues* of less than $125 million in each of the last two years and *total assets* of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block C or frequency block F under this section.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (*i.e.*, from sources whose *gross revenues* and *total assets* are not considered under paragraph (b) of this section), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered.

(b) Exceptions to General Rule.

(1) Small Business Consortia. Where an applicant (or licensee) is a *consortium of small businesses*, the *gross revenues* and *total assets* of each small business shall not be aggregated.

(2) Publicly-Traded Corporations. Where an applicant (or licensee) is a *publicly traded corporation with widely dispersed voting power*, the *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered.

(3) 25 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 25 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(5) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(5) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(4) 49.9 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 49.9 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(6) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(6) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(5) Control Group Minimum 25 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(3) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(5)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 15 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors*, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must have both *de jure* and *de facto* control of the applicant;

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned by any of the following:

(1) Such *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section;

(2) *Institutional investors*, either unconditionally or in the form of stock options;

(3) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

(4) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(6) Control Group Minimum 50.1 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors*, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying minority and/or women investors* must have both *de jure* and *de facto* control of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by any of the following:

(1) Such *qualifying minority and/or women investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(6)(i)(A) of this section;

(2) *Institutional investors*, either unconditionally or in the form of stock options;

(3) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

(4) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) Calculation of Certain Interests. Except as provided in paragraphs (b)(5) and

(b)(6) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) Aggregation of *Affiliate* Interests. Persons or entities that hold interests in an applicant (or licensee) that are *affiliates* of each other or have an identity of interests identified in § 24.720(l)(3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

Example 1: ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A and B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person.

Example 2: ABC Corp. has a subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(c) Short-form and Long-Form Applications: Certifications and Disclosure.

(1) Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q of the this Chapter and § 24.813, each applicant for a license for frequency Block C or frequency Block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

(i) For an applicant that is a *publicly traded corporation with widely disbursed voting power*:

(A) A certified statement that such applicant complies with the requirements of the definition of *publicly traded corporation with widely disbursed voting power* set forth in § 24.720(m);

(B) The identity of each *affiliate* of the applicant if not disclosed pursuant to § 24.813; and

(C) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(ii) For all other applicants:

(A) The identity of each member of the applicant's *control group*, regardless of the size of each member's total interest in the applicant, and the percentage and type of interest held;

(B) The citizenship and the gender or minority group classification for each member of the applicant's *control group* if the applicant is claiming status as a *business owned by members of minority groups and/or women*;

(C) The status of each *control group* member that is *an institutional investor*, an *existing investor*, and/or a member of the applicant's management;

(D) The identity of each *affiliate* of the applicant and each *affiliate* of individuals or entities identified pursuant to paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(C) of this section if not disclosed pursuant to § 24.813;

(E) A certification that the applicant's sole *control group* member is a *preexisting entity*, if the applicant makes the election in either paragraph (b)(5)(ii) or (b)(6)(ii) of this section; and

(F) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(iii) For each applicant claiming status as a *small business consortium*, the information specified in paragraph (c)(1)(ii) of this section, for each member of such consortium.

(2) Long-form Application. In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e), 20.9(b)), each applicant submitting a long-form application for license(s) for frequency blocks C and F shall, in an exhibit to its long-form application:

(i) Disclose separately and in the aggregate the *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section, for each of the following: the applicant; the applicant's *affiliates*; the applicant's *control group* members; the applicant's attributable investors; and *affiliates* of its attributable investors;

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block C or frequency Block F and its eligibility under §§ 24.711 through 24.720, including the establishment of *de facto* and *de*

jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements and identify specifically any such provisions in those agreements identified pursuant to paragraph (c)(2)(ii) of this section, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(3) Records Maintenance. All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including those documents referenced in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section and any other documents necessary to establish eligibility under this section or under the definitions of *small business* and/or *business owned by members of minority groups and/or women*. Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application(s) (Form 175), whichever is earlier.

(d) Audits.

(1) Applicants and licensees claiming eligibility under this section or §§ 24.711 through 24.720 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed broadband PCS service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) Definitions. The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, existing investor, gross revenues, institutional investor, members of minority groups, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, qualifying minority and/or woman investor*, and *total assets* used in this section are defined in § 24.720.

2. Section 24.711 is amended to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Blocks C and F.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses on frequency Blocks C or F subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

(2) Each winning bidder shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted.

(b) Installment Payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license, beginning one year after the date of the initial license grant.

(2) For an eligible licensee with *gross revenues* not exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years or an eligible licensee in a BTA market other than the fifty largest markets, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a *small business* or as a *consortium of small businesses*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a *business owned by members of minority*

groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a *small business owned by members of minority groups and/or women* or as a *consortium of small business owned by members of minority groups and/or women*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (*i.e.*, from sources whose *gross revenues* and *total assets* are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

3. Section 24.712 is amended by revising paragraph (d) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Blocks C and F.

* * * * *

(d) Unjust Enrichment.

(1) If, before termination of the five-year period following the date of the initial license grant, a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If, before termination of the five-year period following the date of the initial license grant, a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

4. Section 24.720 is revised to read as follows:

§ 24.720 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.709 through 24.714, unless otherwise specified in those sections.

(b) *Small Business; Consortium of Small Businesses.*

(1) A *small business* is an entity that, together with its *affiliates* and persons or entities that hold interests in such entity and their *affiliates*, has average annual *gross revenues* that are not more than $40 million for the preceding three years.

(2) For purposes of determining whether an entity meets the $40 million average annual *gross revenues* size standard set forth in paragraph (b)(1) of this section, the *gross revenues* of the entity, its *affiliates*, persons or entities holding interests in the entity and their *affiliates* shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth in § 24.709(b).

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a *small business* in paragraphs (b)(1) and (b)(2) of this section.

(c) *Business Owned by Members of Minority Groups and/or Women.* A *business owned by members of minority groups and/or women* is an entity:

(1) In which the *qualifying investor* members of an applicant's *control group* are members of minority groups and/or women who are United States citizens; and

(2) That complies with the requirements of § 24.709(b)(3) and (b)(5) or § 24.709(b)(4) and (b)(6).

(d) *Small Business Owned by Members of Minority Groups and/or Women; Consortium of Small Businesses Owned by Members of Minority Groups and/or Women*. A *small business owned by members of minority groups and/or women* is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A *consortium of small businesses owned by members of minority groups and/or women* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definitions in paragraphs (b) and (c) of this section.

(e) *Rural Telephone Company*. A *rural telephone company* is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates*.

(f) *Gross Revenues*. *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.* cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after June 30, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(g) *Total assets*. *Total assets* shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recent audited financial statements.

(h) *Institutional Investor*. An *institutional investor* is an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. § 80a-3(a), without reference to, or incorporation of, the exemptions set forth in 15 U.S.C. § 80a-3(b) and (c); provided that, if such investment company is owned, in whole or in part, by other entities, such investment company, such other entities and the *affiliates* of such other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities.

(i) *Members of Minority Groups*. *Members of minority groups* includes Blacks, Hispanics,

American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(j) *Nonattributable Equity*.

(1) *Nonattributable equity* shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than twenty-five percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(ii) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(2) For purposes of assessing compliance with the equity limits in § 24.709(b)(3)(i) and (b)(4)(i), where such interests are not held directly in the applicant, the total equity held by a person or entity shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(k) *Control Group*. A *control group* is an entity, or a group of individuals or entities, that possesses *de jure* control and *de facto* control of an applicant or licensee, and as to which the applicant's or licensee's charters, bylaws, agreements and any other relevant documents (and amendments thereto) provide:

(1) That the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation;

(2) That the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation;

(3) That, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and

(4) That, for other types of businesses, the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to the amount of equity held in the business.

Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the *control group* is widely dispersed (*see, e.g.*, § 24.720(l)(2)(iii)).

(l) *Affiliate*.

(1) Basis for Affiliation. An individual or entity is an *affiliate* of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity :

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) Nature of *control* in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a PCS application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the PCS application, Corporation Y would still be deemed an affiliate of the applicant.

(i) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) Affiliation through stock ownership.

(i) An applicant is presumed to control or have the power to control a concern if he

or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at

will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(11) Exclusions from affiliation coverage.

(i) For purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, Indian tribes

or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered *affiliates* of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of § 24.709(b)(3) and (b)(5) or § 24.709(b)(4) and (b)(6), except that *gross revenues* derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of § 24.709(a) and paragraph (b) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such *gross revenues*.

(ii) For purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, an entity controlled by *members of minority groups* is not considered an *affiliate* of an applicant (or licensee) that qualify as a *business owned by members of minority groups and/or women* if *affiliation* would arise solely from control of such entity by members of the applicant's (or licensee's) control group who are *members of minority groups*. For purposes of this subparagraph, the term minority-controlled entity shall mean, in the case of a corporation, an entity in which 50.1 percent of the voting interests is owned by *members of minority groups* or, in the case of a partnership, all of the general partners are *members of minority groups* or entities controlled by *members of minority groups*; and, in all cases, one in which *members of minority groups* have both *de jure* and *de facto* control of the entity.

(m) *Publicly Traded Corporation with Widely Dispersed Voting Power*. A *publicly traded corporation with widely dispersed voting power* is a business entity organized under the laws of the United States:

(1) Whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States;

(2) In which no person

(i) Owns more than 15 percent of the equity; or

(ii) Possesses, directly or indirectly, through the ownership of voting securities, by contract or otherwise, the power to control the election of more than 15 percent of the members of the board of directors or other governing body of such publicly traded corporation; and

(3) Over which no person other than the management and members of the board of directors or other governing body of such publicly traded corporation, in their capacities as such, has *de facto* control.

(4) The term *person* shall be defined as in section 13(d) of the Securities and

Exchange Act of 1934, as amended (15 U.S.C. § 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of *affiliate* in paragraphs (l)(2) through (10) of this section.

(n) *Qualifying Investor; Qualifying Minority and/or Woman Investor.*

(1) A *qualifying investor* is a person who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* whose *gross revenues* and *total assets*, when aggregated with those of all other attributable investors and *affiliates*, do not exceed the *gross revenues* and *total assets* limits specified in § 24.709(a), or, in the case of an applicant (or licensee) that is a *small business*, do not exceed the *gross revenues* limit specified in paragraph (b) of this section.

(2) A *qualifying minority and/or woman investor* is a person who is a *qualifying investor* under paragraph (n)(1), who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* and who is a *member of a minority group* or a woman and a United States citizen.

(3) For purposes of assessing compliance with the minimum equity requirements of § 24.709(b)(5) and (6), where such equity interests are not held directly in the applicant, interests held by *qualifying investors* and *qualifying minority and/or woman investors* shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(o) *Preexisting Entity; Existing Investor.* A *preexisting entity* is an entity was operating and earning revenues for at least two years prior to December 31, 1994. An *existing investor* is a person or entity that was an owner of record of a *preexisting entity's* equity as of November 10, 1994, and any person or entity acquiring de minimis equity holdings in a *preexisting entity* after that date.

Note: In applying the term *existing investor* to de minimis interests in *preexisting entities* obtained or increased after November 10, 1994, the Commission will scrutinize any significant restructuring of the *preexisting entity* that occurs after that date and will presume that any change of equity that is five percent or less of the *preexisting entity's* total equity is de minimis. The burden is on the applicant (or licensee) to demonstrate that changes that exceed five percent are not significant.

5. Section 24.839 is amended by revising paragraphs (a) and (d) to read as follows:

§ 24.839 Transfer of control or assignment of license.

(a) Approval Required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy or

legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission. A transfer of control or assignment of station authorization in the broadband Personal Communications Service is also subject to §§ 24.711(c), 24.712(d), 24.713(b) (unjust enrichment) and 1.2111(a) of this Chapter (reporting requirement).

* * * * *

(d) Restrictions on Assignments and Transfers of Licenses for Frequency Blocks C and F. No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless --

(1) The application for assignment or transfer of control is filed after five years from the date of the initial license grant;

(2) The application for assignment or transfer of control is filed after three years from the date of the initial license grant and the proposed assignee or transferee meets the eligibility criteria set forth in § 24.709 at the time the application for assignment or transfer of control is filed, or the proposed assignee or transferee holds other license(s) for frequency Blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in § 24.709;

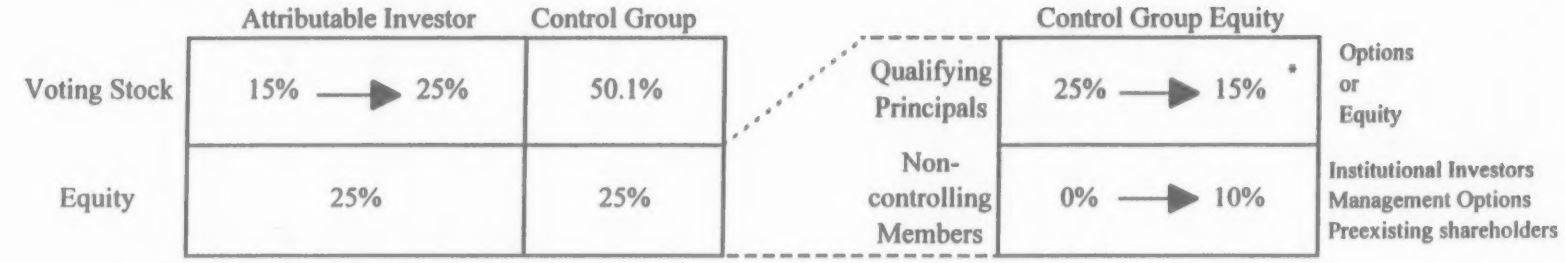
* * * * *

Appendix C

Changes in Control Group Voting and Ownership Thresholds

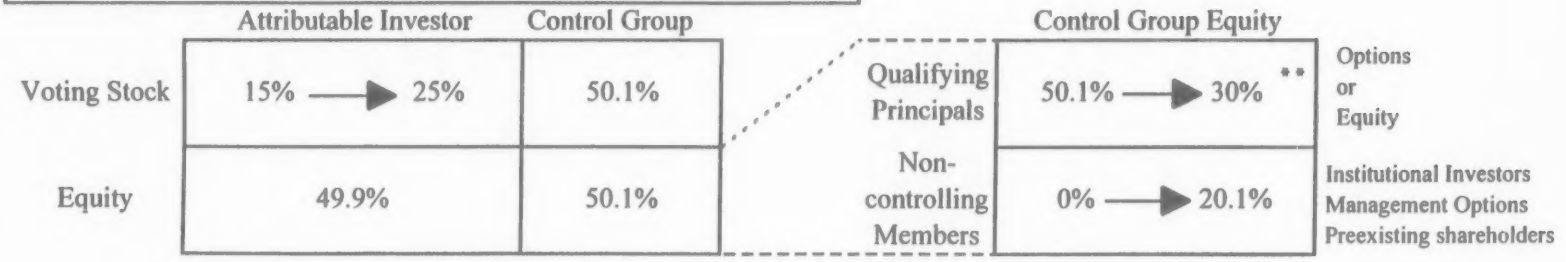
Old Rules ⟶ New Rules

Option A



* After year 3, qualifying individuals need only hold 10% of the equity.

Option B (for minority- and women-owned businesses only)



** After year 3, qualifying individuals need only hold 20% of the equity.

SEPARATE STATEMENT
OF
CHAIRMAN REED E. HUNDT

Re: Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (PP Docket No. 93-253)

On June 29, 1994, the Commission adopted widely-praised rules that increase opportunities for women and minorities to own and operate the telecommunications companies of the next century. Today we adopted revisions to these rules to further assist women- and minority- controlled businesses, as well as small businesses, to attract the financial backing necessary to compete in the auctions and have an opportunity to operate what we hope will be many successful businesses.

While I support the order on reconsideration, I write separately because I believe we have not done as much as we could and should to make sure that our rules promote long-term participation of designated entities (DEs) in the personal communications service (PCS) business, and correspondingly to discourage those who desire only short term participation. Further, I believe we could and should have done more to make sure that the benefits of our measures to promote DE participation will be enjoyed by a sufficiently large number of DEs.

Let me be very clear. What we have done is sound. I only believe that we should have done more.

We must be mindful that some investors may attempt to manipulate our rules to the end of obliging DEs to relinquish control of their companies, as soon as our rules permit sales to non-DEs. Such attempts may be natural, and not necessarily ill-intended. But just as we ought to protect comparatively powerless consumers from monopoly pricing, so also is it part of our duty to assist wireless communications enterprises to cope with the pressure that investors may put on such entities to exit from their businesses sooner than they may wish. Our rules prohibit designated entities from transferring their licenses to any party during the first three years of the license term. In years 3-5, the DE may sell or transfer the license only to another DE. After year 5, a DE may sell or transfer the license to anyone, including a non-DE, subject to unjust enrichment penalties.

Various DEs have reported that in their negotiations with some strategic investors, the investors expressed less interest when the DEs characterized themselves as potential long-term partners. Instead, some investors appear to prefer DEs who commit to selling in five years. In order to minimize the number of

applicants that simply want to cash out rather than actually participate in the communications infrastructure, designated entities have suggested proposals to extend the DE holding term to seven years. See, e.g., Letter from the Minority Enterprise Legal Defense and Education Fund, Inc., November 2, 1994. These designated entities argue that a seven-year holding period would help them attract investors who are interested in backing DEs that want to be long-term providers of PCS services.

I agree with the Minority Enterprise Legal Defense and Education Fund. I favor a rule that extends until year seven the time during which a DE's license can be sold or transferred only to another DE. I believe that such a rule would encourage long-term participation in the PCS market by designated entities, giving them valuable experience and a long-term equity stake in the business. It would also attract investors who are interested in DEs as long-term partners, not just those looking for control of the PCS licenses in the entrepreneurs' block.

Congress directed the Commission to ensure that designated entities "are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. Section 309(j)(4)(D) (emphasis added). Thus, the Commission should do more than simply provide entry-level opportunities for those designated entities that do not intend to become long-term participants in the provision of PCS. I believe that an extension of the holding period from five to seven years would better fulfill our Congressional directive and would ensure that the benefits of the rules we adopt today will endure.

Because my colleagues on the Commission have not chosen to extend the holding period for DEs to seven years, it is particularly important that we use our substantial enforcement powers to the fullest extent to ensure that women, minority and small businesses who win DE licenses control those licenses. DEs must have the opportunity to determine the direction of the business - what services will be provided, at what cost, to whom, and to determine the fate of the business -- whether it will expand, whether it will be sold, and to whom it will be sold. Any attempt to take that decision-making power away from DEs, or to minimize their choices by manipulating contractual or financial arrangements, will be scrutinized with great care as a potential violation of our rules requiring de facto and de jure control by the DE.

As Chairman of the Commission, I will not tolerate abuses of our measures to assist designated entities. We will be vigilant in ensuring that these measures benefit only bona fide DEs; those who abuse our rules will be penalized to the full extent of the law. Immediately after the recent Interactive Video and Data Services (IVDS) auctions, the Commission, on its own motion, initiated an investigation under Section 403 of the Communications Act to investigate allegations of abuse of our designated entity rules. The Commission will use its

considerable enforcement powers in the PCS service as well, and plans to use the substantial resources of the Field Operations Bureau to conduct on-site audits of designated entities, to weed out fraudulent operations, and to ensure that DEs control their PCS operations.

Finally, I am concerned that we have not gone far enough to ensure that the benefits of the DE incentives in broadband PCS are disseminated among a large number of DEs. Our rules permit a single DE to acquire up to 10 percent of the licenses in the entrepreneurs' block. Under our rules, a single DE could acquire the licenses for the top 98 markets, which today would give that DE coverage of 67 percent of the nation's population. It would be a better result to impose a moderate population cap, for example 25 percent, in addition to the cap on the number of licenses. This would ensure a minimum of at least four large-scale DEs, rather than only one, without unduly interfering with efforts to pursue nationwide or regional strategies.

With these changes, I believe that a good decision would become the best decision that the Commission could make. We can and will, however, pursue other strategies, including aggressive enforcement of our rules, to ensure that a larger number of DEs will have opportunities to become long-term participants in the PCS industry.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of Section 309 (j) of the Communications Act--Competitive Bidding (PP Docket No. 93-253)

The Commission by its adoption of this *Order* modifies the auction bidding rules for small, minority and women-owned businesses ("designated entities" or "DEs"). I believe that these modifications will prove beneficial for designated entities as they seek to form capital and strategic alliances to be successful participants in the broadband personal communications services ("PCS") arena. I write separately to emphasize my concern that the Commission not attempt to tailor its rules to each set of unusual circumstances in its endeavor to be sensitive to the obstacles confronted by designated entities.

I am pleased that numerous concerns raised by DEs about the realities of capital formation and strategic investment have been addressed by the Commission in this *Order*. I have consistently stated that designated entities must bring additional incentives to the negotiating table to attract the capital that will be needed to participate as a PCS player.[1] I am concerned, however, that we not strive to address the particular needs of each designated entity seeking to bid in the entrepreneurs' blocks as it may result in the unintentional "tipping" of the level playing field that we have attempted to develop through our auction bidding rules. Notwithstanding my concerns, I applaud the Commission's efforts to remain responsive to the general issues raised by the DE community as they position themselves to participate in PCS.

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[1] See *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, (Separate Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Implementation of Competitive Bidding (PP Docket No. 93-253)

The order we adopt today reaffirms and revises the rules for participation in the auctions for the broadband PCS Entrepreneurs' Blocks. We have clarified the rules in some respects and modified them in others, but in large measure we have maintained the framework we adopted in July. In evaluating the record, our challenge was to devise appropriate measures to afford women, minorities, and other designated entities opportunities to participate fully in emerging wireless communications markets.

As we charted our future direction, I found it helpful to survey the path that has already been taken. When Congress decided to give the FCC auction authority, it directed the Commission to design a competitive bidding system that did not funnel opportunities for participation in new wireless businesses merely to those with "deep pockets." Congress was quite explicit. It said that the competitive bidding system, among other things, must promote "economic opportunity and competition. . ." The system must ensure that "new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

The Commission takes this mandate seriously. As we implement this mandate, we need to bridge two, sometimes conflicting, objectives. We want to provide the flexibility necessary to enable designated entities adequately to capitalize their PCS ventures and we want to ensure that they retain a real economic stake in their business.

In recent weeks, I have heard a lot about exit strategies, about supermajority provisions, rights of first refusal, puts, calls, and management agreements. Potential investors have legitimate interests in protecting their investment and limiting their risks. The Commission has equally legitimate concerns. We do not want to see designated entity firms acquiring licenses, at reduced rates and on preferential terms, only to turn them over to the "deep pockets" at the end of the license holding period. If this happens, in my view, we will have made little progress.

This is not an easy balance. It has required the Commission to ask some hard questions and make some tough decisions. My main test for any modification to these rules has been to ask: will this enhance the ability of the designated entities to obtain access to capital in a manner consistent with reasonable financial principles?

I have also sought to minimize opportunity for "gaming" the process. As a matter of fairness, we must have a compelling reason to make any changes to the rules adopted in our earlier order that might impact business plans of prospective bidders.

We cannot and should not micro-manage. Nor should we exceed our congressional directive to give designated entities the opportunity to participate in the provision of wireless services. There were other measures proposed to benefit designated entities that we have declined to adopt -- correctly, in my view -- because our role is to provide an opportunity, not a guarantee, for participation.

Our Nation's radio spectrum is a scarce resource and, as its steward, the Commission has the obligation to be careful in how it is distributed. Will our efforts to meet our mandate to ensure widespread dissemination of licenses for wireless spectrum provide the public benefit Congress envisioned? The answer to that question will not come in six months, nor even in five years, but rather, in ten years or more as these emerging businesses become thriving enterprises.